NO. 84-1131

FILED
JAN 7 1985
ALEXANDER L. STEVAS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

JOHNS-MANVILLE SALES CORPORATION, ET AL

PETITIONERS

VS.

BEATRICE HANSEN, ET AL

RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Did the Fifth Circuit err in refusing to require the income tax jury instruction of *Norfolk & Western Ry. Co. vs. Liepelt,* 444 U.S. 490, __ S.Ct. __, __ L.Ed.2d __ (1980) ("*Liepelt*") and its progeny?

(2) Is the *Liepelt* instruction a matter of federal common law that should be given in all personal injury/wrongful death cases where properly requested?

(3) Is the *Liepelt* instruction limited to F.E.L.A. cases?

(4) Is the *Liepelt* instruction to be applied in diversity cases where the state has not articulated a substantive interest in refusing the instruction?

(5) Is the policy and purpose behind punitive damages defeated by its repeated application in mass tort litigation?

(6) Does the multiple application of punitive damages in mass tort litigation violate the Fifth and Fourteenth Amendment guarantees of due process and against double jeopardy?

(7) Are strict tort liability and punitive damages compatible doctrines?

(8) Does the Fifth Circuit conflict with prior decisions by this Court, the Fifth Circuit, and other circuits on these questions?

LIST OF PARTIES

Pursuant to Rule 21.1(b), counsel for Cross-Petitioners certifies that the following is a complete list of all parties:

(1) Beatrice Hansen, Petitioner and Cross-Respondent.

(2) Johns-Manville Sales Corporation, Cross-Petitioner and Respondent.

(3) Johns-Manville Products Corporation, Cross-Petitioner and Respondent.

(4) The Travelers Insurance Company, Intervenor.

(5) The Charter Oak Fire Insurance Company, Intervenor.

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TO THE HONORABLE UNITED STATES SUPREME COURT:

COME NOW Cross-Petitioners and seek Writ of Certiorari to the Fifth Circuit's June 11, 1984 judgment and pray that same issue in these regards.

OPINIONS BELOW

The Fifth Circuit Opinion is reported at 734 F.2d 1036 (5th Cir. 1984), as attached in Appendix A. The Court's Order denying the Motion for Rehearing is attached as Appendix B. The jury verdict and the trial court

judgment are attached as Appendix C and D.

JURISDICTION

Cross-Petitioners invoke jurisdiction via 28 U.S.C. §1254(1). The Fifth Circuit's judgment was entered on June 11, 1984, and Motions for Rehearing denied on September 12, 1984.

On December 7, 1984, Cross-Petitioners received Petitioners' Application for Writ of Certiorari and also rely on Supreme Court Rules 21.1(e)(iii) and 19.5.

FEDERAL STATUTES AND RULES INVOKED

United States Constitution, Fifth Amendment.[1]

United States Constitution, Fourteenth Amendment.[2]

26 U.S.C. §104(a)(2).[3]

Federal Rule of Procedure 51.[4]

STATEMENT OF THE CASE

Decedent was MRS. HANSEN's ("HANSEN") spouse. Beginning in 1940, he worked as a pipefitter tearing out and installing insulation, primarily asbestos insulation manufactured by Cross-Petitioners. Due to a serious ankle injury,

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[1] Listed in Appendix F. as per Supreme Court Rule 21.1(f).

[2] Listed in Appendix G. as per Supreme Court Rule 21.1(f).

[3] Listed in Appendix H. as per Supreme Court Rule 21.1(f).

[4] Listed in Appendix I. as per Supreme Court Rule 21.1(f).

Decedent retired in 1976 at age 63, with no plans or expectations to return to work. In 1978, at age 65, he developed chest problems and was diagnosed as having asbestosis and mesothelioma. Thirteen months later, he died. At his death, he had thirteen years of life expectancy left.

HANSEN demanded trial by jury. Cross-Petitioners sought a *Liepelt* income tax instruction which the trial court refused. The jury rendered a verdict on Special Interrogatories, and awarded $260,000.00 for loss of Decedent's care and services, $800,000.00 for Decedent's pain and suffering, and $1,000,000.00 punitive damages. Special damages were agreed at $10,500.00. On May 11, 1982, the trial court entered judgment on the verdict for $2,070,500.00. Post-trial Motions for Judgment N.O.V., Directed Verdict, and New Trial or (alternatively) Remittitur were filed and denied. Cross-Petitioner developed non-asbestosis insulation and ceased making asbestos insulation in 1971.

The Fifth Circuit affirmed the trial court refusal to give the *Liepelt* instruction and refused to strike punitive damages. Cross-Petitioners filed a timely Motion for Rehearing which, on September 12, 1984, was denied. On December 7, 1984, Cross-Petitioners received HANSEN's Application for Writ of Certiorari and rely on Supreme Court Rules 21.1(e)(iii) and 19.5 herein.

GROUNDS FOR GRANTING THE CROSS-WRIT

Pursuant to Rule 17, there are special and important grounds for granting the Cross-Writ for Certiorari:

(1) The Fifth Circuit holds that *Liepelt* is "inaposite" to the case at bar and limits *Liepelt* to F.E.L.A. cases. This

conflicts with *Liepelt's* holding and reasoning, as well as with *Gulf Offshore Co. vs. Mobil Oil Corp.*, 453 U.S. 473, 101 S.Ct. 2870, 69 L.Ed.2d 784 (1981) ("*Gulf Offshore*").

(2) The Fifth Circuit conflicts with other circuits including *In re Air Crash Disaster,* 701 F.2d 1189 (7th Cir. 1983), *cert. den.*, __ U.S. __, 104 S.Ct. 204, 78 L.Ed.2d 178 (1983) ("*Air Crash Disaster*"), a wrongful death case based on diversity jurisdiction (as here) where the state practice (as in Texas) forbids a *Liepelt* instruction.

(3) The lower court's mis-reading of *Liepelt* and its progeny results in inflated jury verdicts.

(4) The applicability and scope of the *Liepelt* instruction, in both diversity and non-diversity cases, is an important question of federal law which should be settled.

(5) The Fifth Circuit, in approving multiple awards of punitive damages in mass tort litigation, conflicts with other opinions within the Fifth Circuit and with other circuits.

(6) Multiple punitive damage awards in mass tort litigation exceeds the level necessary to punish and deter and raises the spectre of undoing the strict liability remedy for present and prospective claimants.

(7) Multiple punitive damage awards in mass tort litigation spells the defeat of the purposes behind strict liability and punitive damages.

(8) Strict liability and punitive damages are inherently incompatible.

ARGUMENT AND AUTHORITIES

I.

The Internal Revenue Code[5] exempts personal injury and wrongful death awards from taxation.[6] While:

> the law is perfectly clear, it is entirely possible that the...jury may assume that a plaintiff's recovery...will be subject to federal taxation and that the award should be increased substantially ...to be sure that the injured party is fully compensated.[7]

Indeed, "it is reasonable to assume the average juror would believe (that its verdict will) be subject to such taxes." *Dempsey vs. Thompson,* 251 SW2d 42, 45 (MO. 1952). *Accord: Domeracki vs.. Humble Oil & Refining Co.,* 443 F.2d 1245, 1251 (3rd Cir. 1971), *cert. den.,* 404 U.S. 883, 92 S.Ct. 212, 30 L.Ed.2d 165 (1971) ("*Domeracki*").

In *Domeracki, supra* at 1251, Judge Ely wrote that

> (w)e take judicial notice of the "tax consciousness" of the American public. Yet, we also recognize...that few members of the general public are aware of the...exception for personal injury awards...in the Internal Revenue Code.
>
> [T]here is always danger that today's tax-conscious juries may assume (mistakenly of course) that the judgment will be taxable and

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[5] 26 U.S.C. §104(a)(2).

[6] *Liepelt, supra* at 444 U.S., 496 n. 12, 62 L.Ed.2d, 695.

[7] *Id.,* at 444 U.S., 496, 72 L.Ed.2d, 695.

> therefore make their verdict big enough so that plaintiff would get what they think he deserves after the imaginery tax is taken out of it. (citations omitted).[8]

In holding that it was reversible error to refuse such an instruction, *Liepelt* noted:

> [t]o put the matter simply, giving the instruction can do no harm, and it can certainly help by preventing the jury from inflating the award and thus overcompensating the plaintiff on the basis of an erroneous assumption that the judgment will be taxable.[9]

In support of the instruction, *Liepelt* found it (1) brief, (2) easily understood, (3) not prejudicial to either party and (4) it would not complicate trial by making other qualifying or supplemental instructions necessary.[10] The instruction would "merely eliminate an area of doubt or speculation that might have an improper impact on the...amount of damages.[11]

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[8] The commentators overwhelmingly agree. *See*, e.g., Burns, "A Compensation Award for Personal Injury or Wrongful Death is Tax Exempt: Should We Tell the Jury?" 14 *De Paul L. Rev.* 320 (1965); Feldman, "Personal Injury Awards: Should Tax-Exempt Status Be Ignored?" 7 *Ariz. L. Rev.* 272 (1966); Nordstrom, "Income Taxes and Personal Injury Awards," 19 *Ohio St. L. Journ.* 212 (1958); Harper & James, *The Law of Torts* §25.12 (1956); Stripp & Rowland, "Taking Account of the Impact of Income Taxes in Personal Injury and Wrongful Death Cases," 36 *Ins. Counsel Journ.* 231 (1969); Morris & Nordstrom, "Personal Injury Recoveries and Federal Income Taxes," 56 *ABA Journ.* 274 (1960); Note, 50 *Ky. L. Rev.* 601 (1962); Note, 32 *Tex. L. Rev.* 108 (1953).

[9] *Liepelt, supra* at 444 U.S., 498, 62 L.Ed.2d, 695-6.

[10] *Id. See, Burlington Northern, Inc. vs. Boxberger*, 529 F.2d 284, 297 (9th Cir. 1975) ("Boxberger"); *Southern Pac. Ry. Co. vs. Guthrie*, 186 F.2d 926 (9th Cir. 1951) ("*Guthrie*").

[11] *Liepelt, supra* at 444 U.S., 496, 62 L.Ed.2d, 606. *Accord: Gulf Offshore, supra* at 453 U.S., 486-7, 69 L.Ed.2d, 797.

As noted in *Liepelt*, "(w)hether it was error to refuse that (income tax) instruction...is a matter governed by federal law."[12] Two years after *Liepelt*, this Court held that *Liepelt* had "general applicability" and that "(n)one of the (*Liepelt*) Court's reasoning was directed particularly at F.E.L.A. (claims)."[13] *Gulf Offshore* held that *Liepelt* "articulated a federal common law rule."[14] To the contrary, the court below held that "*Liepelt* directed such instructions in suits...under the (F.E.L.A.)."[15]

In *Liepelt*, it was argued that the instruction would "fundamentally alter all forms of injury compensation in this country***since...nontaxability is not limited to...the F.E.L.A."[16] This is true, since the Internal Revenue Code exempts any damages due to personal injury and wrongful death—not just those in F.E.L.A. claims. "The instruction furthers strong federal policies of fairness and efficiency in litigation of federal claims."[17] Mr. Justice Blackmun noted, "(t)he Court's expressed intention to apply the *Liepelt* rule *expansively*...." (emphasis added);[18] the lower courts have been doing so. *See*, e.g., *Air Crash Disaster*, *supra* (a wrongful death diversity case, where a state

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[12] *Liepelt*, *supra* at 444 U.S., 492-3, 62 L.Ed.2d, 693.

[13] *Gulf Offshore*, *supra* at 453 U.S., 487 n. 17, 69 L.Ed.2d, 797 n. 17.

[14] *Id.*, at 453 U.S., 486, 69 L.Ed.2d, 796-7.

[15] 734 F.2d, 1045.

[16] *Liepelt*, *supra* at 444 U.S., 500 n. 3, 62 L.Ed.2d, 698 (Mr. Justice Blackmun, dissenting).

[17] *Gulf Offshore*, 453 U.S., 487, 69 L.Ed.2d, 797.

[18] *Id.*, at 453 U.S., 498, 69 L.Ed.2d, 798 (Mr. Justice Blackmun, concurring).

court would have refused the instruction); *Fanetti vs. Hellenic Lines, Ltd.*, 678 F.2d 424 (2nd Cir. 1982) (the Longshore and Harbor Workers Act); *Austin vs. Loftsgaarden*, 675 F.2d 168 (8th Cir. 1982) (Securities Exchange Act); *Blanchfield vs. Dennis*, 438 A2d 1330 (MD 1982); *Curtis vs. Finneran*, 417 A2d 15 (NJ 1980); *In re Eader*, 434 NE2d 757 (OHIO CT.CL.—1982). Although not all courts have followed *Liepelt*,[19] it clearly is the prevailing trend in the courts, its just rule and sound reasoning are supported, overwhelmingly, by the commentators.

Because the *Liepelt* instruction furthers strong federal policies of fairness and efficiency, articulates federal common law, and is not limited to F.E.L.A. claims, legal symmetry would be served by expressly expanding *Liepelt* to all wrongful death/personal injury cases heard in federal courts.

The Fifth Circuit, in rejecting *Liepelt*, applied Texas law:

> (t)his case is brought under Texas law...(which) applies to the question whether)the)...instruction is warranted. Texas law explicitly disapproves...such an instruction because it introduces a collateral matter into the damage issue. (citations omitted).[20]

This is clearly wrong.

Liepelt states that the question "is governed by federal law."[21] Further, the substantive law relating to the

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[19] *Air Crash Disaster, supra* at 1196-7 (compiling cases).

[20] 734 F.2d, at 1045.

[21] *Liepelt, supra* at 444 U.S., 496, 62 L.Ed.2d, 696.

instruction is the Internal Revenue Code. The state concern (collateral matter in the damage issue) is a "matter over which federal courts have independent competence." *Air Crash Disaster, supra* at 1200.

As noted in *Air Crash Disaster, supra* at 1199:

> (o)rdinarily, in a diversity case, state law determines the content of jury instructions and federal law governs...the manner in which...(they) are requested and given. This rule is rooted in *Erie* principles insofar as the...instruction expounds substantive state law. That rationale may be lacking...(where)...(local) law refuses the instruction altogether, rather than defining its content, and...the substantive law to which the instruction...relates is the Internal Revenue Code. (citations deleted).

Thus, the Seventh Circuit noted that "unless...(the state) has a substantive interest in refusing the instruction..., perhaps federal law should control." *Id.* The court concluded that federal law controlled since the state "concerns are either precedural or based on a mistaken view of federal law." *Id.*, at 1200.

Texas displays no "substantive interest." The first Texas case on point, *Texas & New Orleans Ry. Co. vs. Pool*,[22] was an F.E.L.A. case, which approved a *Liepelt*-type instruction, citing *Guthrie* and *Dempsey vs. Thompson*, both later relied on in *Liepelt*[23] and *Gulf Offshore*.[24]

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[22] 263 SW2d 582, 592 (TEX.CIV.APP.—Waco 1954, *no writ*).

[23] 444 U.S., 496-7.

[24] 453 U.S., 487 n. 17.

The Texas Supreme Court, however, expressly disapproved *Pool,* prohibiting the instruction solely on the ground that it "introduced a wholly collateral matter into the damage issue." *Missouri Pacific Ry. Co. vs. McFerrin,* 291 SW2d 931, 945 (TEX. 1956). This is the sole ground in Texas for refusing the *Liepelt* instruction.[25]

In *Turner,* the Texas Supreme Court faced a well-reasoned dissent by Judge Keith (Court of Appeals)[26] who noted that the state rule was "unrealistic" in these tax-conscious days, citing *Boxberger* and *Domeracki,* both later relied on by *Liepelt* and *Gulf Offshore.* Nevertheless, the Texas Supreme Court reaffirmed the local rule and prohibited such an instruction.

The Texas concern is the same one expressed by the Fifth Circuit in *Johnson vs. Penrod Drilling Co.* ("too speculative and complex for a jury's deliberations").[27] *Penrod's* "notion" was considered and rejected in *Liepelt.*[28] Texas (as Illinois in *Air Crash Disaster*) has *not* declared a "substantive interest" in refusing to give a *Liepelt* instruction. Although the case did not address a *Liepelt* instruction, *Bridgen vs. Scott,* 456 F.Supp. 1048, 1061 (S.D. TEX. 1978) noted that:

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[25] *Turner vs. General Motors Co.,* 584 SW2d 844, 853 (TEX. 1979); *St. Louis & SW Ry. Co. vs. Greene,* 552 SW2d 880, 884 (TEX.CIV.APP.—Texarkana 1977, *no writ*).

[26] 567 SW2d 812, 822 (TEX.CIV.APP.—Beaumont 1978).

[27] 510 F.2d 234, 236-7 (5th Cir. 1975).

[28] *Liepelt, supra* at 444 U.S., 494, 62 L.Ed.2d, 694. *See, Gulf Offshore,* 453 U.S., 485, 69 L.Ed.2d, 795-6.

> (r)equiring the jury or this court to try this case without reference to...tax consequences...would be requiring the jury and the court to live in an artificial "never-never" land.

Accord: Burgess vs. Premier Corp., 727 F.2d 826, 838 (5th Cir. 1984).

CONCLUSION—LIEPELT INSTRUCTION

Texas has not declared a substantive interest in rejecting the *Liepelt* instruction, which, in any event, is based on federal law. The Texas rationale is tantamount to those "notions" considered and rejected earlier in *Liepelt* and *Gulf Offshore.*

The question is one of federal law. The instruction furthers strong federal policies and is a matter of federal common law. The commentators overwhelmingly support the instruction. This Court has indicated *Liepelt's* "general applicability" and its intent to apply *Liepelt* "expansively."

The Fifth Circuit erred in affirming the trial court refusal to give a *Liepelt* instruction.

II.

As noted by the Fifth Circuit:[29]

> (a)pproximately 30,000...plaintiffs have filed suits against asbestos manufacturers since 1973, and industry experts predict that plaintiffs will file an

[29] 734 F.2d, at 1040 n. 4.

> additional 500 suits each month. The potential liability of Johns-Manville alone for compensatory damages alone has been estimated to exceed $2 billion....Johns-Manville filed for Chapter 11 reorganization, claiming that the exposure it faced in asbestos litigation threatened its solvency and, ultimately, its viability. In support of its claim, Johns-Manville pointed out that in 1981 and the first half of 1982; litigation had resulted in ten punitive damage verdicts against it and an average of $616,000.00 per verdict.

In *Jackson vs. Johns-Mansville Sales Corp.*, 727 F.2d 506, 524 (5th Cir. 1984), the court noted that "over 14,000 cases are pending against...(Johns-Manville alone)..., seeking over $50 billion in damages, far beyond its financial resources. (O)ver 9300 of those suits seek punitive damages...." The court indicated that:

> the number of lawsuits (against Cross-Petitioner) ...from 1982 on is likely to be about 45,000, with a reasonably firm lower bound of 30,000 and a very definite upper bound of 120,000.[30]

Over 21 million Americans have been exposed to asbestos; over 200,000 deaths from asbestos-related cancer is projected by the year 2000.[31] The bankruptcy court has held that Cross-Petitioners did not, in bad faith, file under Chapter 11 but "on the basis of the crushing economic burden it will bear over the next...30 years...(due to) the

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[30] *Jackson, supra* at 528, n. 29, citing *In re Johns-Manville Corp.*, 36 B.R. 743, 746 (BKRTCY S.D. NY 1984).

[31] *Jackson, supra* at 524. The number does not include deaths from asbestosis.

the future claims of asbestos victims."[32]

When Cross-Petitioners' resources are exhausted and can no longer be used to satisfy damage awards, where will these claimants go? This is the practical question raised.

The *Jackson* court accurately illustrated the crisis:

> (s)pecial problems attend awards of punitive damages in the myriad actions which have arisen from the catastrophic nation-wide exposure of workers to asbestos. The scope of this mass litigation is *without precedent* and practically *without dimension.*[33]

The court went on to state that the:

> grave reality of the need to maintain viable enterprises to meet future compensation liabilities to already injured persons and those with latent diseases commands consideration of the *whole picture* rather than a myopic, mechanical analysis...look(ing) to this...(case) alone and deny that there exists tens of thousands of others and the potential for many times more.[34] (emphasis added).

This is the crisis facing the court today.

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[32] *Id.*, at 528, n. 39, citing *In re Johns-Manville Corp.*, 36 B.R. 727 (BKRTCY S.D. NY 1984). As of 1981, there were over 3000 "asbestos plaintiffs" in the Eastern District of Texas alone. *Migues vs. Fibreboard Corp.*, 662 F.2d 1182, 1189 (5th Cir. 1981); *Hardy vs. Johns-Manville Sales Corp.*, 509 F.Supp. 1353, 1354 (E.D. TEX. 1981).

[33] *Jackson, supra* at 524.

[34] *Id.*, at 524-5.

The potential for overkill in the award of punitive damages in a mass-products case is inconsistent with the underlying *policy* objectives of strict liability and punitive damages. *Jackson, supra* at 524-30; *Roginsky vs. Richardson-Merrell,* 378 F.2d 832, 839 (2nd Cir. 1967).

Jackson stated that:

> (i)n the extraordinary circumstances in which this litigation is set, the allowance of punitive damages is incompatible with the objectives of and would disrupt the viability of the strict liability cause of action. Moreover, the basic policy objectives of punitive damages are satisfied in this instance by...multiple exposure to compensatory damages.[35]

Therefore, *Jackson* concluded that "punitive damages are inappropriate in these extraordinary circumstances."[36]

Justice Friendly, writing for the Second Circuit, agreed, noting that "(t)he legal difficulties engendered by claims of *hundreds* of plaintiffs are staggering."[37] Here, literally hundreds of *thousands* are involved. *Roginsky* also states that "(w)e have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be administered as to avoid overkill.... (A) sufficiently egregious error as to one product can end the business life of a concern that has

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[35] *Jackson, supra* at 525.

[36] *Id.*

[37] *Roginsky, supra* at 841.

wrought much good in the past and might...continue to do so in the future."[38]

Punitive damage awards should not exceed the level necessary to punish and deter; otherwise, "overkill" is presented. *See,* e.g., *Ratner vs. Sioux Falls Nat. Gas Corp.,* 719 F.2d 801, 805 (5th Cir. 1983). The repeated pounding of Cross-Petitioners with often grossly inflated punitive damage awards is "overkill," has led to Chapter 11 reorganization, and threatens to end even compensatory awards for potentially hundreds of thousands of claimants. Cross-Petitioners' extinction through punitive damage awards is clearly threatened; to allow such would be to deprive hundreds of thousands of potential claimants any relief. *Jackson, supra* at 524-5. This "commands consideration of the whole picture rather than a myopic, mechanical analysis" of the single case at bar. *Id.,* at 525.

Punitive damages are designed to punish and deter. *Jackson, supra* at 525-6.[39] They are harsh, quasi-criminal penalties and are not favored in the law.[40] They are

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[38] *Id.*

[39] *See also, IBEW vs. Foust,* 442 U.S. 42, 48, 99 S.Ct. 2121, 60 L.Ed.2d 698 (1979); *Prosser, Law of Torts* §2 (4th ed. 1971); *Dobbs, Law of Remedies* §3.9 (1973); Owen, "Problems in Assessing Punitive Damages Against Manufacturers of Defective Products," 49 *Chi. L. Rev.* 1 (1982). This is the majority view. *Northwest Nat'l Cas. Co. vs. McNulty,* 307 F.2d 432, 436 (5th Cir. 1962). This is the Texas law. *Pace vs. State,* 650 SW2d 64, 65 (TEX. 1983).

Deterrence is no longer viable as to Cross-Petitioners. As early as 1964, they placed warnings on their asbestos products exceeding later-developed O.S.H.A. requirements, developed non-asbestos insulation, and ceased making asbestos insulation in 1971. The record at bar reflects this. *cf, Jackson, supra* at 527.

[40] *See* Footnote 39 and also *Ratner, supra* at 804.

"damages ultra compensation and are...inflicted when the wrong...partakes of a criminal character...."[41] The purpose of punitive damages and criminal fines are identical, *Restatement 2d of Torts* §908, comment a, but the consequence of punitive damages may greatly exceed that of a criminal fine, especially in the context of mass tort litigation.[42] Texas authorities as early as 1880 recognized the criminal nature of punitive damages:

> (s)uch indifference (required to recover punitive damages) is morally criminal and if it leads to actual injury may well be regarded as *criminal in law*....(O)mission or nonfeasance, to be punishable by exemplary damages, should reach the borderline of a *quasi-criminal* act.... (emphasis added).

So. Cotton Press & Mfg. vs. Bradley, 52 TEX. 587, 600-01 (TEX. 1880).

Cross-Petitioners' rights are violated when deprived of property without due process. *Western Union Telegraph Co. vs. Pennsylvania*, 368 U.S. 71, 75, 82 S.Ct. 199, 7 L.Ed.2d 139 (1962) (holding that a judgment violated due process by depriving of property without assurance that one would not be held liable again in another jurisdiction or in a suit brought by a claimant not bound by the first judgment).

Due process encompasses rights held fundamental to our constitutional system. Repeated and unlimited punishments for a single course of conduct violates due

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[41] *Northwestern Nat'l Cas. Co. vs. McNulty, supra* at 435.

[42] *Roginsky, supra* at 839.

process, and the Fifth Amendment guarantee against double jeopardy. the Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb" and "*protects against multiple punishments for the same offense.*" *North Carolina vs. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969). *See, Brown vs. Ohio*, 432 U.S. 161, 165, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977).

While attempts to avoid the double jeopardy issue have been made by classing punitive damages as a civil remedy, this simplistic distinction cannot resolve Cross-Petitioners' due process rights when subjected to repeated awards of punitive damages for the same conduct. A careful analysis must be made of the nature and purposes of the penalty imposed and the purposes of the Fifth and Fourteenth Amendments.

This Court has held that the Constitution prohibits deprivation of property interests without due process, and "this protection is not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute." *Giaccio vs. State of Pennsylvania*, 382 U.S. 399, 402, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966) (rejecting the lower courts' rationale that the act in question was not penal but simply collecting civil costs).

The award of punitive damages presenting due process probelms has been recognized since early times. The Colorado Supreme Court considered the double jeopardy issue and concluded that it applied to punitive damages, even though not technically a criminal penalty:

> Courts attempt...to explain away the apparent conflict (by) say(ing) that the language...refers

> exclusively to criminal procedure, and...not...civil actions. (T)his position amounts to a complete surrender of the...spirit and intent of [the Constitution]. When the convention framed and...the people adopted the constitution both understood the purpose...to be the prevention of double prosecutions for the same offense. Yet, under the rule allowing exemplary damages, not only may two prosecutions, but also two convictions and punishments, be had. What difference does it make to the accused...that one prosecution takes the form of a civil action, in which he is called defendant? He is practically harassed with two prosecutions and subjected to two convictions; while no hypothesis, however ingenious, can cloud in his mind the palpable fact that for the same tort he suffers two punishments. *Murphy vs. Hobbs*, 5 P 119, 120 (COL. 1884).

cf, Northwestern Nat'l Cas. Co. vs. McNulty, supra at 435.

Labeling the matter as civil or quasi-criminal cannot avoid constitutional scrutiny of the penalty. There is abundant authority that certain safeguards apply where punishment is imposed, regardless of the label. *See, In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967); *Giaccio vs. State of Pennsylvania, supra; Kennedy vs. Mendoza-Martinez*, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963); *Trop vs. Dallas*, 356 U.S. 86, 78 S.Ct. 590 2 L.Ed 630 (1958). In *trop*, the Court stated;

> How simple would be the tasks of constitutional adjudication...if specific problems could be solved by inspection of the labels pasted on them. Manifestly the issue of whether Section 401(g) [the statute providing for deportation as a result of desertion] is a penal law cannot be thus determined.

id., 356 U.S., 94. Deciding whether a law is penal is generally based upon a determination of the purpose of the statute. *Id.*, at 96. Here, where multiple punitive damage awards are imposed, constitutional principles require at least minimal assurance against multiple, unrestrained punishments to the point of Cross-Petitioners' extinction. Due process and fundamental fairness require that punishments have some limit, and some relationship to the alleged wrong. While an individual award of punitive damages may bear some relationship to the alleged wrong, multiple awards in numerous separate cases is constitutionally defective due to the absence of any control over the number, size, or proportion of the awards.

The Fifth Circuit resolved the question by noting that (1) the state did not bring the lawsuit, and (2) punitive damages were not part of an essentially criminal proceeding.[43] The State is involved by virtue of the courts, a branch of the State governmental system. The legal system, at least in Texas, maintains that a plaintiff suing for punitive damages represents the *public*,[44] and the theory fo punitive damages "involves a blending of the interest of *society in general* with those of the...individual" (emphasis added)[45] Indeed, "(a)bhorrence to successive reprosecutions is deeply rooted in our common law traditions...(which is) central...to our constitutional concept of justice."[46]

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[43] 734 F.2d, 1042.

[44] *Cole vs. Tucker*, 6 TEX. 266 (1851).

[45] *Foster vs. Bourgeois*, 253 SW 880 (TEX.CIV.APP.—Austin 1923), *aff'd at* 259 SW 971 (TEX. 1924).

[46] *U.S. vs. Wilkins*, 348 F.2d 844, 849-50 (2nd Cir. 1965).

Punitive damages are inherently inconsistent with a strict liability cause of action. They focus on Defendant's *conduct*, while strict liability is predicated only on the *condition of the product. Gold vs. Johns-Manville Sales Corp.*, 553 F.Supp. 482, 483-4 (D.C. NJ 1982), *appeal dism'd at* 723 F.2d 1068 (3rd Cir. 1983); *Butcher vs. Robertshaw Controls Co.*, 550 F.Supp. 692, 705 (D.C. MD 1981);[47] *Walbrun vs. Berkel, Inc.*, 433 F.Supp. 384, 385 (D.C. WISC. 1976); *Wolf by Wolf vs. Proctor & Gamble Co.*, 555 F.Supp. 613, 618, 618 n. 1 (D.C. NJ 1982); Purdue and Sales, "The Law of Strict Liability in Texas," 14 *Houston L. Rev.* 1, 155 (1976-7);[48] Sales, "The Emergence of Punitive Damages in Product Liability Actions: A Further Assault on the Citadel," 14 *St. Mary's L. J.* 351 (1983). *Jackson, supra* at 529, noted the authorities but did not reach the question because:

> (o)ur holding today is limited to the extraordinary circumstances of this litigation, where...punitive damages carries the manifest portent of undoing the strict liability remedy for present and prospective claimants and where the purposes of punitive damages are otherwise served.

The court held that "strict liability for compensatory damages imposes adequate punishment...in this type of case," *id.*, at 530, and disallowed punitive damages in an "effort to preserve the viability of strict liability compensation." *Id.*, at 529, 530.

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[47] And cases cited therein.

[48] "Strict liability...and punitive damages are not...compatible doctrines. In a strict...liability action, the condition of the product...is a critical issue. The conduct of the manufacturer is of no consequence; ...in...punitive damages, ...the conduct of the actor is the ultimate...consideration."

Alternatives are explored in *Jackson*:[49]

(1) Cling to the traditional judge-made remedy of punitive damages, indifferent to the disruption of Defendants' enterprises and to future claimants.[50] This would exact retribution at the expense of claimants in need of compensatory awards and is a particularly opprobrious view where retribution is exacted by on-going claims for compensatory damages. 727 F.2d, 525, 528.

(2) Bankruptcy is inappropriate to suggest as a viable solution of problems created by court-made rules in situations alien to those originally intended to redress. *Id.* The numbers of future claimants and the size of their claims is "purely speculative" and adequate compensation for future claimants a difficult and formable task. *Id.*

(3) "Properly crafted federal legislation," which has not come to pass. 727 F.2d, 529-30.

(4) Avoid overkill by requiring an instruction to consider Defendant's wealth and the probable effects of future actual and punitive damage awards. This would "require...unearthly prescience" about the result of the thousands of pending cases and those certain to arise in the future. 727 F.2d, 527;

(5) Set an arbitrary cap, either in the aggregate or the individual case. There is no criteria as to the amount the "cap" should be, absent statutory guidance. *Id.*;

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[49] *Jackson, supra* at526-30.

[50] One court has suggested that the manufacturer's demise is *not* a "necessarily untenable" result. *Acosta vs. Honda Motor Co.*, 717 F.2d 828, 838 n. 15 (3rd Cir. 1983).

> (6) Require a single class action approach for a single award of punitive damages. This is not feasible, "because the losses are so widespread and disparate, the vital legal issues would not be common to all plaintiffs; (neither would)...the applicable legal standards... in all jurisdictions in which cases would arise." 727 F.2d, 527.[51]

These alternatives are not "viable in these extraordinary circumstances." *Id.*, at 527. In order to preserve strict liability compensation *in these cases, Jackson* disallowed punitive damages altogether. *Id.*, at 525, 526, 529, 530.

The Fifth Circuit declined to follow *Jackson* because of dicta[52] in two lower Texas courts: *Heil vs. Grant*[53] and *Rawlings Sporting Goods Co. vs. Daniels.*[54] Thus, the Fifth Circuit felt "Erie-bound" not to hold otherwise, although the question "is not definitely settled" and neither case involved mass tort litigation "without precedent" and "without dimension."[55]

The Texas Constitutional provision—on its face—applies only to "wilful act(s), omission(s), or gross negligence," none of which is presented in products liability. Indeed:

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[51] Another alternative is to assign a "credit" (punitive damages already paid) against those awarded by the jury. *cf, North Carolina vs. Pearce, supra* at 395 U.S., 717-19, 23 L.Ed.2d, 665-6.

[52] 734 F.2d, 1041-2.

[53] 534 SW2d 916, 926 (TEX.CIV.APP.–Tyler 1976, *writ ref'd n.r.e.*). *Heil*, in dicta, opined that the Texas Constitution (Art. 16 §26) would allow punitive damages in a wrongful death case.

[54] 619 SW2d 435 (TEX.CIV.APP.–Waco 1981, *writ ref'd n.r.e.*). *Rawlings* upheld punitive damages in a personal injury/products liability case without mention of the Texas Constitution.

[55] 734 F.2d, 1041-2.

> no manufacturer would engage consciously in wrongdoing that would expose it to such overwhelming strict liability with any reasonable expectation of doing so profitably. On the contrary, the prospect of...mass litigation...provides... impetus...to take affirmative steps to ensure (product) safety.... *Jackson, supra* at 527.

Further, casual dicta is not afforded a great deal of deference. *Air Crash Disaster, supra* at 1196; *Mekenna vs. Ortho*, 622 F.2d 657, 662 (3rd Cir. 1979). The law to be applied under *Erie* principles is that which the Supreme Court of a state would apply. *Comm'r of IRS vs. Estate*, 387 U.S. 456, 465, __ S.Ct. __, __ L.Ed.2d __ (1967) ("while the decree of lower state courts should be attributed some weight, the decision (is) *not controlling*...where the highest court of the state has not spoken on the point.").[56]

The writ histories of both *Heil* and *Rawlings* clearly show that the Texas Supreme Court was "not satisfied that...(either) had correctly declared the law but...that the application(s) (for writ of error) present no (reversible) error." TEX.R.CIV.P. 483. The "*writ ref'd n.r.e.*" designation is "as much a commentary...on the [petitioner's] application for writ...it is an evaluation of the (lower) Court judgment." *Commercial Standard Ins. Co. vs. Martin*, 488 SW2d 861, 864 (TEX.CIV.APP.—San Antonio 1972, *writ ref'd n.r.e.*). If these cases had correctly declared and applied the law, a "*writ ref'd*" designation would have been given. TEX.R.CIV.P. 483.

The Court must balance the dicta dound in two lower Texas courts (neither on point with the case at bar) against

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[56] *Roberts vs. Western Southern Life Ins. Co.*, 568 F.Supp. 536 (D.C. ILL. 1983).

the broader, underlying policy considerations, in *Jackson*. The "extraordinary circumstances" in *Jackson* are the very same ones present in the case at bar. Having no guidance from the Texas Supreme Court on the effect and treatment of multiple punitive damage awards in product liability cases, this Honorable Court must consider that the Texas Supreme Court would be equally concerned for "the continued viability of the strict liability cause of action for present and future claimants." To do otherwise is to assume that the Texas Supreme Court would make no effort to preserve the viability of strict liability compensation, in the face of so many asbestos-related cases within the state boundaries. Lower appellate court dicta, in two out-of-point cases, is *not* controlling here; the policy considerations, clearly enunciately in *Jackson* and existing at bar, should be.

CONCLUSION AND PRAYER

Today's juries are tax conscious creatures, keenly aware of the federal income tax "bite." This has been judicially noticed. Few members of the general public are aware, however, of the tax exemption for personal injury and wrongful death awards. The end result of these factors is an inflated verdict rendered by jurors seeking to counter the imaginery (but non-existent) tax.

The answer is the *Liepelt* instruction. It is brief, easily understood, and does not prejudice either party. The instruction's sound purpose is to eliminate an area of speculation having an improper, inflationary impact on damage awards.

Although this Court expressly noted that *Liepelt* is not limited to F.E.L.A. cases, the Fifth Circuit held to the

contrary. *Liepelt* is a matter of federal common law, which furthers strong federal purposes, and is based on the Internal Revenue Code. State law (which forbids the instruction on grounds rejected in *Liepelt*) does not control in this diversity case because, *inter alia*, state courts have expressed no substantive interest in the matter.

The Court of Appeals erred in affirming the trial court refusal to give the *Liepelt* instruction.

In asbestos-related litigation, the nation faces a crisis "without precedent" and "practically without dimension." the Bankrupting and extinction of companies formerly making asbestos insulation will do nothing more than penalize approximately 200,000 current and future claimants. The only viable alternative to this "grave reality" is to prohibit the award of punitive damages in this type of case.

The punitive damage purpose is served by continued exposure to compensatory damage awards; deterrence no longer exists as to Cross-Petitioners, since they ceased making asbestos insulation 15 years ago. The continued battering of Cross-Petitioners with often grossly inflated punitive awards violates the spirit and letter of Due Process and Double Jeopardy guarantees, since punitive damages are penal in nature. The Court of Appeals erred in refusing to so hold.

WHEREFORE, PREMISES CONSIDERED, Cross-Petitioners pray that the Cross-Petition be granted and the Fifth Circuit Opinion regarding these complaints be reversed and remanded with instructions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Otto D. Hewitt, III, hereby certify that three copies of this Cross-Petition for Writ of Error has been served on opposing counsel, Mr. Atreus Clay, 5225 Allendale, Houston, Texas 77017, by certified mail, return receipt requested, on this the 7th day of January, 1985.

_____

Otto D. Hewitt, III

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-2276

BEATRICE MAE HANSEN, ET AL.,
Plaintiffs-Appellees,

v.

JOHNS-MANVILLE PRODUCTS
CORPORATION, ET AL.,
Defendants,

JOHNS-MANVILLE SALES CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

(June 11, 1984)

Before RUBIN and RANDALL, Circuit Judges, and SEAR,* District Judge.

RANDALL, Circuit Judge:

Johns-Manville Sales Corporation and Johns-Manville Products Corporation (collectively "Johns-Manville")

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* SEAR, District Judge of the Eastern District of Louisiana, sitting by designation.

appeal a jury verdict awarding compensatory and punitive damages to the widow of Andrew Hansen, a former shipyard worker, for wrongful death caused by exposure to Johns-Manville asbestos products. We affirm as to liability, but remand to the district court to order a remittitur or a new trial at the option of the plaintiff.

I.

Andrew Hansen ("decedent") began working for Todd Shipyards in 1940 as a pipefitter, tearing out old insulation in ships and installing new insulation. During his employment, decedent worked primarily with products containing asbestos[1] that were manufactured by Johns-Manville. Decedent suffered a serious ankle injury in 1976 and retired due to that injury.

In 1978, at age 65, decedent developed chest problems. He was ultimately diagnosed as suffering from asbestosis and mesothelioma, both of which are caused by exposure to asbestos.[2] Thirteen months later, he died.

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1. Asbestos is the name of a group of naturally occurring fibrous minerals known for their properties of relative indestructibility and resistance to heat and fire. During World War II, the protective clothing, insulation and shipbuilding industries created a dramatic increase in the demand for asbestos. Once considered harmless, asbestos is now regarded as one of the most dangerous of all natural minerals. *See* Special Project, *An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation*, 36 Vand. L. Rev. 573 (1983).

2. Parenchymal asbestosis is the earliest known and most common asbestos-related disease. In some cases, asbestosis may become manifest within ten years of the date of initial exposure. In general, asbestosis manifests itself between ten and twenty-five years after initial exposure. Inhalation of asbestos fibers initiates a scarring process that destroys air sacs in healthy lung tissue. The result is a decrease in pulmonary function and lung volume. Symptoms include shortness of breath, coughing, chest pains and clubbing of fingers. The disease is not always fatal, but it is progressive and incurable.

Decedent's widow ("Hansen") filed suit against Johns-Manville and thirteen other defendants in 1979. Hansen alleged causes of action based upon strict liability for the manufacture of the asbestos-containing insulation and upon negligence for failure to adequately test and inspect, and for failure to warn. Prior to trial, all defendants, except Johns-Manville, were non-suited on Hansen's motion. A jury trial was then held. The jury returned answers to special interrogatories finding for Hansen on all counts and awarded Hansen $260,000 for loss of care and services, $800,000 for decedent's anguish and pain and suffering, and $1,000,000 in punitive damages. Judgment in the amount of $2,060,000 was entered by the district court on May 11, 1982. Johns-Manville's motions for judgment n.o.v., remittitur, and new trial were denied. Johns-Manville appeals.

II.

On appeal, Johns-Manville raises twelve distinct issues relating to evidence submitted at trial, interrogatories submitted to the jury, the various post-judgment motions, and the award of punitive damages. We will address each of these issues in turn.

Deposition Testimony of Dr. Kenneth Smith.

Johns-Manville asserts that the trial judge erred in admitting the deposition testimony of Dr. Kenneth Smith,

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Mesothelioma is a malignant tumor in the membrane lining of the lungs, chest cavity and abdominal cavity which metastizes quickly and is generally fatal. Unlike asbestosis, no relationship between the degree of exposure to asbestos and development of the disease has been established. Mesothelioma has developed in individuals exposed to minimal quantities of asbestos. *See* Comment, *Asbestosis: Who Will Pay the Plaintiff?* 57 Tul. L. Rev. 1491, 1491-93 (1983); Special Project, *supra* note 1, at 579.

former medical officer of Johns-Manville, because no proper foundation was laid showing the nature of his employment at the time of the deposition, the course of his knowledge, or his authority to speak for the company. *See generally* H. Wigmore, *Evidence* § 654 (3d ed. 1940). This argument is without merit. Dr. Smith's deposition clearly reveals the nature of his medical practice at the time of the taking of the deposition. As to the course of his knowledge, Dr. Smith's deposition relates his educational background and the fact that he served as Medical Director of Johns-Manville until 1966. Finally, since Dr. Smith was not testifying as an agent for Johns-Manville, authority to speak as an agent was not required. Dr. Smith's deposition was properly admitted.

The "Sumner Simpson" Papers.

Johns-Manville contends that the district court erred in admitting into evidence several documents from the "Sumner Simpson" papers. These papers consist of various correspondence, surveys and memoranda compiled by Sumner Simpson, the President and later Chairman of the Board of Raybestos Corporation ("Raybestos"), and discovered after his death. Raybestos, like Johns-Manville, employed asbestos in its products. Several documents from the collected papers were admitted into evidence to show that Johns-Manville knew of the alleged dangers of asbestos prior to 1964 and thus was negligent and grossly negligent in failing to warn of those dangers. Johns-Manville objects to the admission of these documents on the grounds that the papers were not authenticated, that they were heasay and not within any exception, and that they are irrelevant to any issue in the case.

In a similar case decided recently by this court, *Jackson v. Johns-Manville Sales Corp.*, No. 82-4288, slip op. at 2736 (5th Cir. March 23, 1984), we held that the district court erred in admitting three letters from the Sumner Simpson papers, including one admitted in the present case, on the ground that they were relevant to no issue in the case. We determined that, because the letters introduced concerned studies having to do with workers in asbestos mines, they were irrelevant to the issue of the defendants' knowledge of dangers regarding insulation workers. We need not decide, however, whether admission of the Sumner Simpson papers was erroneous in this case, for even assuming, *arguendo*, that such admission was error, we find that, on the record presented in this case, it was harmless error.

The Sumner Simpson papers were introduced in this case to show that Johns-Manville knew or should have known of the dangers of asbestos to shipyard workers and insulators prior to 1964 and thus, that Johns-Manville had a duty to warn of that danger. However, Hansen presented other evidence, particularly the testimony of Dr. Smith,[3] which would show that Johns-Manville knew of the dangers of asbestos to insulation workers well before 1964. Thus, the introduction of the Sumner Simpson papers was merely cumulative. It is well settled that the improper admission of evidence that is merely cumulative on matters shown by other admissible evidence is harmless error. *Coughlin v. Capitol Cement Co.*, 571 F.2d 290, 307 (5th Cir. 1978). Thus, even if the district court erred in admitting the Sumner Simpson papers in this case, an issue that we expressly do not decide, it was harmless error.

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3. Dr. Smith testified that he told Johns-Manville of the dangers asbestos presented to insulation workers as early as the 1940s.

Punitive Damages/Gross Negligence.

Johns-Manville raises several issues with regard to the jury's finding of gross neglience and award of punitive damages. Under Texas law, a plaintiff is entitled to punitive damages upon a showing of gross negligence, i.e., that the defendant was consciously, knowingly indifferent to the plaintiff's welfare and safety. *Maxey v. Freightliner Corp.*, 665 F.2d 1367, 1374 (5th Cir. 1982). Johns-Manville argues that the potential for overkill in the award of punitive damages in mass products liability situations such as this[4] is inconsistent with the underlying policy objectives of both strict liability and punitive damages. Johns-Manville also argues that it has been subjected to repeated awards of punitive damages, thus unconstitutionally subjecting it to double jeopardy. Johns-Manville further argues that the district court erred in denying its motions for directed verdict,[5] judgment n.o.v., and new

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4. Approximately 30,000 individual plaintiffs have filed suits against asbestos manufacturers since 1973, and industry experts predict that plaintiffs will file an additional 500 suits each month. The potential liability of Johns-Manville alone for compensatory damages alone has been estimated to exceed $2 billion. On August 26, 1982, Johns-Manville filed for Chapter 11 reorganization, claiming that the exposure it faced in asbestos litigation threatened its solvency and, ultimately, its viability. In support of its claim, Johns-Manville pointed out that in 1981 and the first half of 1982 litigation had resulted in ten punitive damage verdicts against it at an average of $616,000 per verdict. In re *Johns-Manville Corp.*, No. 82 B (S.D. N.Y. petition filed August 26, 1982). *See generally* Special Project, *supra* note 1, at 691.

5. Johns-Manville presents this argument as "[t]he trial court erred in submitting special interrogatory no. 8 (having to do with gross negligence) because there was no evidence to support its submission." Because Johns-Manville is arguing that the issue should not have been submitted to the jury because of insufficient evidence, this argument is more properly addressed to the district court's denial of Johns-Manville's motion for directed verdict. We will treat it as such. Subsequent issues that were similarly presented will be treated as appeals from the denial of a directed verdict as well.

trial with regard to gross negligence and punitive damages.

In *Jackson v. Johns-Manville Sales Corp., supra,* we held that Mississippi substantive law would disallow punitive damages in asbestos products liability actions. In *Jackson,* the plaintiff, who had contracted asbestosis, brought a products liability action against Johns-Manville and Raybestos-Manhattan, Inc. After the jury returned a verdict in favor of the plaintiff and awarded actual and punitive damages, the defendants appealed. A panel of this court disallowed the punitive damages awarded, holding that Mississippi substantive law would disallow such awards in a similar situation, because in the extraordinary circumstances in which asbestosis litigation is set, the allowance of punitive damages is incompatible with the objectives of and would disrupt the viability of the strict liability cause of action. Finding that strict liability in Mississippi "seeks not merely to assure compensation for the individual plaintiff, but to achieve the broader societal objective of equitable loss distribution," the *Jackson* panel determined that the presence of a viable enterprise is essential to the maintenance of effective loss distribution in strict liability. Because of the number of similar suits already filed, asbestos defendants face repeated assessments of punitive damages that threaten to exhaust their resources. Therefore, the panel determined that, at the point at which awards of punitive damages destroy the viability of the enterprise, the remedy of punitive damages becomes antithetical to the policy of strict liability and thus, that punitive damages must not be allowed. Furthermore, the panel found that the basic policy objectives of punitive damages—punishment and deterrence—are satisfied by multiple exposure to compensatory dam-

ages. Johns-Manville presents similar arguments in the present case, urging that the very attributes of the Mississippi law of strict liability that prompted the *Jackson* panel to find that Mississippi law would disallow punitive damages in this type of case are present in Texas law as well. Thus, Johns-Manville argues, this panel should follow the panel decision in *Jackson*.

Following a review of the relevant decisions of the Texas courts, we find that we are unable to follow *Jackson* in this case. At least one Texas court has said that punitive damages may be recovered under Article 16, Section 26 of the Constitution of the State of Texas[6] in a strict liability action for the death of the user of a defective product. *Heil Co. v. Grant*, 534 S.W.2d 916, 926 (Tex. Civ. App.—Tyler 1976 writ ref'd n.r.e.) ("We believe that exemplary damages may be recovered under [Tex. Const. art. 16, section 26] in a strict liability action for the death of the user of a defective product."); *see also Maxey v. Freightliner Corp.*, 665 F.2d 1367, 1371-72 & n.4 (5th Cir. 1982).[7] To be sure, *Heil* did not involve a mass products liability situation such as the one

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6. Article 16, section 26 provides:

> Every person, corporation, or company, that may commit a homicide, through a wilful act, or omission, or gross neglect, shall be responsible, in exemplary damages, to the surviving husband, widow, heirs of his or her body, or such of them as there may be. . . .

Tex. Const. art. 16, section 26.

7. In *Maxey*, we were presented with the argument that, as a matter of law, punitive damages are not available in products liability cases in Texas. Noting the language of *Heil*, we said: "Absent some reason to believe that the Texas courts, when presented with the question, will erect such a bar to recovery of exemplary damages, which otherwise are guaranteed by the Texas Constitution, this Court is reluctant to do so." 665 F.2d at 1371 n.4. There have been no such indications from the Texas courts within the intervening two years that would convince us to depart from our conclusion in *Maxey*.

facing this court in *Jackson* and in the present case. However, to the extent that punitive damages are guaranteed to claimants by the Texas Constitution, such a fact is irrelevant; article 16, section 26 does not distinguish between mass torts and singular torts. We also recognize that the above-referenced language in *Heil* is dicta. But, while it is not definitively settled that punitive damages are guaranteed by the Texas Constitution in strict liability actions for the death of a user of a defective product, the *only* suggestion we have from the Texas courts is that there is, indeed, such a right. Absent a clear indication from the Texas courts to the contrary, we are *Erie*-bound not to dictate otherwise. Accordingly, we find no basis upon which to hold that Texas courts would disallow punitive damages in a case such as this.[8]

Johns-Manville next contends that the award of punitive damages in mass tort cases is unconstitutional because punitive damages are analogous to criminal penalties. Thus, Johns-Manville argues that the constitution requires assurance against multiple, unrestrained punishments in the form of punitive damages. In essence, Johns-Manville is arguing that it is being subjected to double jeopardy.

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8. In addition to the Texas constitutional provision, there is another factor which distinguishes *Jackson* and Mississippi law from the present case and Texas law. *Jackson* did not involve an action for wrongful death, but was instead an action for personal injury. While the Texas Supreme Court has yet to address the issue, at least one Texas appellate court has upheld an award of punitive damages in a products liability action for personal injury which did not involve wrongful death. *Rawlings Sporting Goods Co. v. Daniels*, 619 S.W.2d 435 (Tex. Civ. App.—Waco 1981, writ ref'd n.r.e.). Thus, there is some suggestion that the Texas courts may allow punitive damages in products liability actions even in cases not covered by article 16, section 26, an issue which we need not decide in this case.

The fifth amendment guarantee against double jeopardy, applicable to the states through the fourteenth amendment, protects against multiple punishments for the same offense. *North Carolina v. Pearce,* 395 U.S. 711, 717 (1968). However, the jeopardy to which the fifth amendment refers is not present in proceedings that are not "essentially criminal." *Breed v. Jones,* 421 U.S. 519, 528 (1974). In *Breed,* the Supreme Court faced the question of whether juvenile proceedings are "essentially criminal" for purposes of the double jeopardy prohibition. In finding that juvenile proceedings are "essentially criminal," the Court relied upon the purpose of the proceeding, the potential consequences, and the fact that the action was brought by and backed by the resources of the state. The Court found that the purpose of the juvenile proceeding was to determine whether the defendant had committed acts that violate a criminal law. The possible consequences of the proceeding were the stigma inherent in the determination of a criminal violation and the deprivation of liberty for many years.

Based upon *Breed,* we determine that punitive damages awarded in a private lawsuit by an individual plaintiff are not part of an "essentially criminal" proceeding and, thus, do not fall within the purview of the prohibition against double jeopardy. A jury's determination that a homicide has occurred as a result of gross negligence necessary to award punitive damages is not a determination that a criminal law has been violated. Moreover, that determination does not carry with it the conseqeunces that the *Breed* Court found necessary for an "essentially criminal" proceeding. While Johns-Manville will be deprived of property, it will not suffer the stigma normally accompanying criminal proceedings. Thus, the conse-

quences that attend the type of proceeding involved here are not of the variety that the Court has recognized as rising to the level of requiring protection against double jeopardy. Perhaps more importantly, this is not an action brought by the state, but one brought by a private individual. We have uncovered no cases, and Johns-Manville points us to none, in which a court has afforded double jeopardy protection as to any proceeding that was not initiated by the state. Accordingly, we do not find that Johns-Manville has been subjected to double jeopardy in violation of the fourteenth amendment.

Johns-Manville next contends that the district court erred in denying its motion for directed verdict and motion for judgment n.o.v. with relation to gross negligence and punitive damages. The propriety of a district court's denial of a directed verdict or judgment n.o.v. is measured by the standard set by this court in *Boeing Co. v. Shipman,* 411 F.2d 365, 374 (5th Cir. 1969) (en banc):

> If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury.

On appeal, the court is to view all the evidence with all reasonable inferences most favorable to the nonmoving party. *Campbell v. Bowlin,* 724 F.2d 484, 489 (5th Cir.

1984). Thus, the question before this court on appeal is whether there was sufficient evidence concerning Hansen's allegations of gross negligence to present a jury question.

Gross negligence is defined under Texas law as "that entire want of care which would raise the belief that the act or omission complained of was a result of a conscious indifference to the right or welfare of the person . . . affected by it." *Missouri Pacific Railroad Co. v. Shuford,* 72 Tex. 165, 10 S.W. 408, 411 (1888); *see also Maxey v. Freightliner Co., supra,* at 1372; *Burk Royalty Co. v. Walls,* 616 S.W.2d 911 (Tex. 1981). Punitive damages may be awarded upon a showing of gross negligence. Johns-Manville argues that it submitted evidence that showed that it made efforts to inspect its products and to participate in safety studies; that it began to issue warnings with its asbestos-containing products in 1964, as soon as scientific evidence was available that proved a relationship between those products and asbestosis; and that it developed an asbestos-free replacement in 1971. This evidence, Johns-Manville argues, represents strange behavior for a defendant who allegedly was wilfully, intentionally and consciously indifferent to decedent's rights, welfare and safety. However, although much evidence in favor of Johns-Manville was developed at trial, the question confronting this court is not whether this court as a trier of fact would decide the issue in favor of one side or the other, but whether there was sufficient evidence in support of Hansen's claim to present a jury question. We hold that there was. Hansen presented the testimony of Dr. Smith, a former medical officer of Johns-Manville. Dr. Smith testified that he informed Johns-Manville of the hazards asbestos presented to asbestos insulation

workers and recommended placing warnings on insulation products as early as the 1940s, but that Johns-Manville did not act on his recommendations. We believe that this evidence is sufficient to present a jury question. If the jury believed the testimony of Dr. Smith, they could reasonably find that Johns-Manville had been grossly negligent in failing to warn Hansen of the dangers related to its products. It is the function of the jury, not the court, to determine the credibility of witnesses. *Boeing Co. v. Shipman, supra,* at 375. Accordingly, we hold that the district court properly denied Johns-Manville's motion for a directed verdict and motion for judgment n.o.v. with relation to gross negligence and punitive damages.

Johns-Manville also argues that the district court erred in denying its motion for a new trial with relation to gross negligence and punitive damages, alleging that the jury's answers to special interrogatories were against the great weight of the evidence. On a motion for new trial, the trial judge is free to weigh the evidence and may grant a new trial if he believes the verdict is contrary to the weight of the evidence. *United States v. An Article of Drug . . . 4,680 Pails,* 775 F.2d 976, 989-90 (5th Cir. 1984). However, as an appellate court, our review of the denial of a new trial is severely limited; we may interfere only when the trial court abuses its discretion or fails to exercise it. *Id.; Bazile v. Bisso Marine Co.,* 606 F.2d 101 (5th Cir. 1979). Thus, we review the denial of a motion for new trial based on insufficiency of the evidence only to determine whether there was an "absolute absence of evidence to support the jury's verdict." *Dunn v. Sears, Roebuck & Co.,* 639 F.2d 1171, 1175 (5th Cir. 1981). We do not find such an "absolute absence" in this case.

Negligent Failure to Test.

Johns-Manville next argues that the district court erred in refusing to grant a directed verdict on Hansen's claim of negligent failure to test and inspect its asbestos products.[9] Johns-Manville asserts that the record is awash with evidence of its efforts to test and inspect its products, and its participation as early as 1929 in studies regarding asbestos-containing products. Johns-Manville points specifically to evidence that shows that it supported, funded, and provided personnel for the *Selikoff* studies, funded the *Lanza* studies, participated in the *Trudeau* studies, was a funding sponsor of the *Brayn-Truan* studies, and helped fund the *Vorwall* studies. However, each of these studies was conducted after the products were already on the market, and thus this evidence does not go to the central inquiry of the issue submitted to the jury—whether Johns-Manville was negligent in failing to test and inspect its asbestos products *before making them available on the market.*[10] Thus, we find that sufficient questions were raised by the evidence as to whether Johns-Manville tested its products within the *relevant* time frame to submit the issue to the jury. *See Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1090-91 (5th Cir. 1973) (manufacturer has duty to inspect and test product prior to putting product on market).

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9. *See supra* note 4.

10. The special interrogatory submitted to the jury inquired:

> Do you find from a preponderance of the evidence that on the occasion in question the defendant was negligent
>
> * * *
>
> (c) in failing to test and inspect its asbestos products to discover the dangerous propensities of such products before making them available in the market.

Government Specification Defense.

Johns-Manville requested that the trial judge submit the following instruction and special interrogatory to the jury:

> Where the United States Government, or an agency of the United States Government, requires that a product be manufactured and sold in conformity with governmental specifications, a manufacturer may rely upon the specifications in the manufacture and sale of its product; a manufacturer or seller is not liable for conduct arising out of the conformity of its products with such governmental specifications.
>
> Do you find from a preponderance of the evidence that the Defendant manufactured and sold, in accordance with United States governmental specifications, the asbestos containing products of Defendant which were a producing, (proximate) cause of Andrew Hansen's injury?

The trial judge refused to give the requested instruction and to submit the special interrogatory.

In federal court, "a litigant is entitled to have the jury instructed as to his claims and theories of law if they are legally correct, supported by the evidence, and are brought to the court's attention in a timely request." *Corey v. Jones,* 650 F.2d 803, 806 (5th Cir. 1981). Johns-Manville contends that the district court's refusal to instruct the jury was error because "government specification" is a defense in an asbestosis case and the evidence in the record supported submission of the issue to the jury. We do not agree.

The government specification defense has three elements: establishment of product specifications by the

government, manufacture in accordance with those specifications, and government knowledge equal to that of the manufacturer of the hazards. *In re Agent Orange Product Liability Litigation,* 506 F.Supp. 762, 792-96 (E.D.N.Y. 1980). The rationale behind the defense is an extension of sovereign immunity: in circumstances in which the government would not be liable, private contractors who act pursuant to government directives should not be liable. *Id.* Johns-Manville, citing three unpublished opinions from the Western District of Washington, contends that this defense is available to manufacturers in asbestos cases.

Johns-Manville has cited no cases in which Texas courts have recognized a "government specification" defense; nor has it cited us to any cases that suggest that Texas courts would adopt such a theory. Absent some reason to believe that the Texas courts, when presented with the question, would adopt such a defense, we are unwilling to do so. Moreover, even were we to adopt such a defense, we do not believe that it would apply in this case. Todd Shipyards, Hansen's employer, performed work under government contract for only five of Hansen's twenty-six years of employment. We do not think that the defense would apply in these circumstances. Accordingly, we hold that the district court did not err in refusing the requested instruction and interrogatory.

Refusal of Instruction as to Taxability of Damage Awards.

Johns-Manville requested that the district court instruct the jury that damage awards are not subject to federal taxation. The district court refused. Johns-Manville asserts that this refusal was error. We do not agree. This case is brought under Texas law, and that law

applies to the question whether such an instruction was warranted. *Cioce v. Brumley Corp.*, 623 F.2d 1084, 1097 (5th Cir. 1980). Texas law explicitly disapproves of such an instruction because it introduces a collateral matter into the damage issue. *Missouri-Kansas-Texas R.R. Co. v. McFerrin*, 291 S.W.2d 931, 945 (Tex. 1956); *Caterpillar Tractor Co. v. Gonzales*, 599 S.W. 2d 633 (Tex. Civ. App.—El Paso 1980, writ ref'd n.r.e.). Johns-Manville's reliance upon *Norfolk & Western Railway Co. v. Liepelt*, 444 U.S. 490 (1980), and *Gulf Offshore Co. v. Mobil Oil Corp.*, 628 S.W.2d 171 (Tex. Civ. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.), in an attempt to show a "trend" in Texas courts to allow such instructions is misplaced. The Supreme Court, in *Liepelt*, directed such instructions in suits brought under the Federal Employers' Liability Act; *Gulf Offshore* was a case brought under Louisiana substantive law. Thus, both cases are inapposite to this case, brought under Texas law. The district court properly refused to give the requested instruction.

Denial of Motion for New Trial Based Upon Juror Misconduct.

During *voir dire*, all jurors were asked whether they or their family had previously worked with or around asbestos products. Johns-Manville contends that one juror concealed the fact that he had worked as a pipefitter while in the Navy and that, in that job, he had worked with asbestos products. Johns-Manville contends that this juror had done the same type of work as decedent had performed and that he was aware that he had worked around asbestos. Johns-Manville maintains that, had it known of this juror's work with asbestos-insulated pipes,

it would have excluded him as a juror. Johns-Manville's motion for a new trial based on jury misconduct was denied.

We review the denial of a motion for new trial for abuse of discretion. *Bunch v. Walter,* 673 F.2d 127 (5th Cir. 1982). We do not find that the district court abused its discretion in this case. Johns-Manville's allegations concerning jury misconduct arise out of a court-approved tape recorded conversation between Johns-Manville's counsel and the juror. After carefully reviewing the transcript of that conversation, we are convinced that there was no jury misconduct and that Johns-Manville's allegations are meritless. The juror stated that he was in the Navy during the Korean conflict and that he was classified as a pipefitter, but that his job was more properly characterized as a general handyman. Most of the pipefitting work was done on shore by others; his pipefitting work consisted of necessary repairs at sea and as to those he said, "I can't even really recall occasions of having that kind of problems." When asked if he ever installed or tore out insulation, the juror replied that he had never even seen any insulation on board ship. Finally, when asked if whether, in his work as a pipefitter, he ever had occasion to do any work with asbestos insulation on pipes, he answered, "if that was the type of covering." The juror's answer thus indicates that he had no prior knowledge of working with asbestos. We find that the district court did not abuse its discretion in denying Johns-Manville's motion for a new trial.

Refusal To Grant a Remittitur.

The jury awarded Hansen $260,000 in damages for the loss of her husband's care and services; $800,000 for

the decedent's pain and suffering; and $1,000,000 in punitive damages. Johns-Manville moved for remittitur, which the trial court denied. On appeal, Johns-Manville asserts that the district court erred in refusing its motion.

We have recently summarized the scope of this court's review in cases in which remittitur is urged:

> The jury's award is not to be disturbed unless it is entirely disproportionate to the injury sustained. We have expressed the extent of distortion that warrants intervention by requiring such awards to be so large as to "shock the judicial conscience," "so gross or inordinately large as to be contrary to right reason," so exaggerated as to indicate "bias, passion, prejudice, corruption, or other improper motive," or as "clearly exceed[ing] that amount that *any* reasonable man could feel the claimant is entitled to." Nonetheless, when a jury's award exceeds the bounds of any reasonable recovery, we must suggest a remittitur ourselves or direct the district court to do so. Our power to grant a remittitur is the same as that of the district court. We determine the size of the remittitur in accordance with this circuit's "maximum recovery rule," which prescribes that the verdict must be reduced to the maximum amount the jury could properly have awarded.

Caldarera v. Eastern Airlines, Inc., 705 F.2d 778, 784 (5th Cir. 1983) (footnotes omitted).

We turn first to the jury's award of $260,000 to Hansen for care, services, advice, counsel and contributions of a pecuniary value that decedent would have provided but for his death. Johns-Manville asserts that the award of $260,000 is excessive because decedent was retired, had no plans to go back to work, and the only "services" he performed were driving the car and keeping the check-

book. Hansen points out that she does not drive and that she was totally dependent upon decedent to take her wherever she wanted to go. She argues that this service along with that of keeping the checkbook, as well as the care, advice, counsel and attention that decedent provided, warrants the jury's award.

Selecting a value to place upon such items as care, advice, counsel, protection and attention is a difficult task. However, the very purpose of an action for wrongful death is to fix damages in money for what cannot be measured in money's worth. Thus, as we noted in *Caldarera, supra*:

> Unless we are to accept any verdict, in whatever amount, as a legally acceptable measure, we must review the amount a jury or a trial court awards. Reassessment cannot be supported entirely by rational analysis. It is inherently subjective in large part, involving the interplay of experience and emotions as well as calculation. The sky is simply not the limit for jury verdicts, even those that have been once reviewed.

705 F.2d at 784. Considering these somewhat subjective factors combined with the pecuniary value of the household services that the decedent performed, we agree with Johns-Manville that the jury verdict was excessive. The sum of $260,000 for care and services is substantially greater than any we have discovered in other reported cases.[11] We consider that the maximum verdict for care and services over the thirteen year life expectancy of

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11. *See, e.g., Barger v. Petroleum Helicopters, Inc.*, 514 F.Supp. 1199 (E.D. Tex. 1981) (award of $22,090 for loss of services of 46-year-old man); *State v. Teer*, 542 S.W.2d 255 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.) (award of $15,000 for loss of household services of 26-year-old woman); *C.E. Duke's Wrecker Service, Inc. v. Oakley*, 526 S.W.2d 228 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.) (award of $6,000 for loss of wife's services).

decedent that the district court should have permitted to stand, without remittitur, was $40,000.

We similarly determine that the jury's award of $800,000 for pain and suffering was contrary to reason. Decedent's symptoms began to manifest themselves in May, 1978; he died thirteen months later. During most of this thirteen month period, decedent was on pain medication. While the evidence showed that decedent suffered some pain despite the medication and that he suffered mental anguish as well, we find that $800,000 is excessive.[12] Accordingly we consider that the maximum verdict for pain and suffering that the trial court should have let stand, on this record, was $250,000.

We turn next to the jury's award of punitive damages. Under Texas law, "the amount of exemplary damages should be reasonably proportioned to the actual damages found." *Southwestern Investment Co. v. Neely*, 452 S.W. 2d 705 (Tex. 1970); *see also Maxey v. Freightliner Co., supra*, at 1377. Texas courts look to five factors in evaluating whether a punitive damage award is proportionally excessive: (1) the nature of the wrong; (2) the character of the conduct involved; (3) the degree of culpability of the wrongdoer; (4) the situation and sensibilities of the parties; and (5) the extent to which the defendant's conduct offends a public sense of justice and propriety.

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12. *Compare with Amoco Production Co. Inc. v. Thompson*, 657 S.W.2d 824 (Tex. Civ. App.—Corpus Christi 1983) ($105,000 to welder for pain and suffering occurring from severe burns); *Hernandez v. Braddock*, 641 S.W.2d 359 (Tex. Civ. App.—Corpus Christi 1982) ($50,000 award to woman who suffered fractured clavicle, fractured pelvis, dislocation of joints in her pelvis, and multiple skin abrasions); *Ferrero v. United States*, 603 F.2d 510 (5th Cir. 1979) (award of $375,000 to 53-year-old female who was severely and painfully injured in automobile accident for pain and suffering *and* loss of earning capacity).

First Security Bank & Trust Co. v. Roach, 493 S.W.2d 612, 619 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.). In addition to these factors, when an appellate court has determined that a remittitur of a substantial portion of the actual damages found by a jury is required, it must then also give consideration to the ratio between actual and punitive damages as established by the jury. *Southwestern Investment Co. v. Neely, supra*, at 708. *See also Natco, Inc. v. Williams Brothers Engineering Co.*, 489 F.2d 639 (5th Cir. 1974) (district court directed to order remittitur of actual damages and proportionate remittitur of punitive damages).

The jury awarded Hansen punitive damages that approximately equaled actual damages. Having determined that a remittitur of actual damages is required in this case, we find that a proportionate reduction of punitive damages is required. Accordingly, we determine that a remittitur of punitive damages to $300,000 is proper in this case.

CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed as to liability. However, we reverse as to damages, and remand to the district court. On remand, Hansen shall be given the option of accepting or rejecting the remittitur thus determined. If Hansen accepts the remittitur, the district court shall grant the remittitur and enter judgment accordingly. If Hansen refuses the remittitur, the district court shall grant a new trial solely on the issue of damages.

The judgment of the district court is AFFIRMED in part, REVERSED in part and REMANDED with instructions. Costs to be borne by appellant.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 82-2276

BEATRICE MAE HANSEN, ET AL.,
Plaintiffs-Appellees,

v.

JOHNS-MANVILLE SALES PRODUCTS
CORPORATION, ET AL.,
Defendants,

JOHNS-MANVILLE SALES CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas

ON PETITIONS FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion June 11, 5 Cir., 1984, ____F.2d____)

(September 12, 1984)

Before RUBIN, RANDALL, Circuit Judges, and Judge Sear*, District Judge.

PER CURIAM:

* * *

The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the

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* Sear, District Judge of the Eastern District of Louisiana, sitting by designation.

members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

* * *

ENTERED FOR THE COURT:

/s/ CAROLYN DINEEN RANDALL
United States Circuit Judge

REHG-7

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CIVIL ACTION NO. G-79-124

BEATRICE MAE HANSEN, etc., et al
Plaintiff

v.

JOHNS-MANVILLE SALES CORPORATION
Defendant

(Filed Mar. 29, 1982)

VERDICT OF THE JURY

INTERROGATORY NO. 1

Do you find from a preponderance of the evidence that Andrew T. Hansen was injured as a result of his being exposed to insulation products containing asbestos manufactured and sold by the defendant.

Answer: "Yes" or "No"

ANSWER: Yes

INTERROGATORY NO. 2

Do you find from a preponderance of the evidence that prior to 1964 it was reasonably foreseeable by defendant that occupational exposure to said products by the de-

ceased and similarly situated workers might cause serious respiratory illness.

Answer: "Yes" or "No"

ANSWER: Yes

If your answer to Interrogatory No. 2 is "Yes," then answer Interrogatory No. 3; otherwise proceed to Interrogatory No. 5.

INTERROGATORY NO. 3

Do you find from a preponderance of the evidence that the absence of warning prior to 1964 to deceased and similarly situated users that occupational exposure to defendant's asbestos products might cause serious respiratory illness constituted a defective condition in the products which rendered their use unreasonably dangerous.

Answer: "Yes" or "No"

ANSWER: Yes

If your answer to Interrogatory No. 3 is "yes," then answer Interrogatory No. 4; otherwise proceed to Interrogatory No. 5.

INTERROGATORY NO. 4

Do you find from a preponderance of the evidence that the defective condition of the products was a producing cause of the death of the deceased, Andrew T. Hansen.

Answer: "Yes" or "No"

ANSWER: Yes

INTERROGATORY NO. 5

Do you find from a preponderance of the evidence that on the occasion in question the defendant was negligent.

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(a) In failing to warn prior to 1964 that occupational exposure by the deceased to defendant's asbestos products might cause serious respiratory illness;

(b) in failing to provide the deceased with knowledge of reasonably safe protective equipment or methods of handling its products;

(c) in failing to test and inspect its asbestos products to discover the dangerous propensities of such products before making them available in the market.

Answer: "Yes" or "No" on each line in Column 1.

If any answer in Column 1 is "yes," do you find from a preponderance of the evidence that any such negligence was a proximate cause of the death of Andrew T. Hansen.

Answer: "Yes" or "No" on the corresponding line of Column 2.

	Column 1 Negligence	Column 2 Proximate Cause
(a) in failing to warn	Yes	Yes
(b) in failing to provide with knowledge	Yes	Yes
(c) in failing to test and inspect	Yes	Yes

If your answer to Interrogatory No. 4 is "yes," or if any of your answers in Column 2 of Interrogatory No. 5 are "yes," then answer Interrogatories No. 6 & No. 7; otherwise do not answer Interrogatories No. 6 and 7.

INTERROGATORY NO. 6

What sum of money, if any, if paid now in cash do you find from a preponderance of the evidence would fairly and reasonably compensate the plaintiff for her pecuniary loss, if any, resulting from the death of Andrew T. Hansen.

Consider the following elements, if any, to the extent that they are proved by a preponderance of the evidence and none other: care, services, advice, counsel, and contributions of pecuniary value that plaintiff would in reasonable probability have received from Andrew T. Hansen during his lifetime had he lived.

There is no exact standard for fixing the compensation to be awarded on account of such elements of damage. Any such award should be fair and just in light of the circumstances.

In arriving at an award of damages, you must not consider and cannot allow the plaintiff any amount of money as compensation for grief, sorrow, anguish or bereavement suffered by her as a result of the death of Andrew T. Hansen, or compensation for the loss of society, affection, or companionship of the deceased.

Answer: State an amount in dollars and cents, if any.

ANSWER: $260,000.00

INTERROGATORY NO. 7

What sum of money, if any, do you find from a preponderance of the evidence would have fairly and reasonably compensated Andrew T. Hansen for his conscious physical pain, if any, and mental anguish, if any, suffered before his death, as a result of the occurrence in question.

There is no exact standard for fixing the compensation to be awarded on account of such elements of damage. Any such award should be fair and just in light of circumstances.

Answer: State an amount in dollars and cents, if any.

ANSWER: $800,000.00

If you have answered Interrogatories No. 6 and No. 7, then answer Interrogatory No. 8; otherwise do not answer Interrogatory No. 8.

INTERROGATORY NO. 8

Do you find from a preponderance of the evidence that the defendant committed acts of gross negligence, and that such gross negligence was a proximate cause of the death of Andrew T. Hansen.

Answer: "Yes" or "No."

ANSWER: Yes

If your answer to Interrogatory No. 8 is "Yes," then answer Interrogatory No. 9; otherwise do not answer Interrogatory No. 9.

INTERROGATORY NO. 9

What sum of money, if any, do you find from a preponderance of the evidence that plaintiff should be awarded against the defendant as punitive damages for the death of Andrew T. Hansen.

Answer: State an amount in dollars and cents, if any.

ANSWER: $1,000,000.00

The foregoing constitutes the verdict of this jury.

/s/ ELNA M. LONG
Foreperson

Date: March 29, 1981

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CIVIL ACTION No. G-79-124

BEATRICE MAE HANSEN, etc., et al,
Plaintiff

v.

JOHNS-MANVILLE SALES CORPORATION,
Defendant

(Filed May 11, 1982)

JUDGMENT

THE COURT, having determined that there is no just reason for delay, directs the entry of a final judgment as to plaintiff's claims against the defendant Johns-Manville Sales Corporation pursuant to Fed. R. Civ. P. 54(b). Now, in accordance with the true verdict of the jury and the stipulations of record between the parties in this case, it is

ORDERED, ADJUDGED and DECREED that plaintiff, Beatrice Mae Hansen, recover of the defendant, Johns-Manville Sales Corporation the sum of TWO MILLION SEVENTY THOUSAND FIVE HUNDRED AND NO/100 DOLLARS ($2,070,500.00), together with interest thereon at the rate of nine percent (9%) per annum from the date of judgment until finally paid; and

Further ORDERED that the intervenors, The Travelers' Insurance Companies and Charter Oak Fire Insurance Company, have and recover from the proceeds of said judgment the sum of SIXTY-ONE THOUSAND FIVE HUNDRED AND 51/100 DOLLARS ($61,500.51), plus an additional TWO HUNDRED SIXTY-ONE AND 51/100 DOLLARS ($261.51) for each week after March 15, 1982, beginning March 22, 1982, and each week thereafter through the date of Judgment.

Taxable costs of court, if any, are assessed against the defendant.

This is a final judgment only as to plaintiff's claims against Johns-Manville Sales Corporation. Cross-actions filed by Johns-Manville Sales Corporation have been severed for trial and are pending.

DONE this the 11th day of May, 1982, at Galveston, Texas.

/s/ HUGH GIBSON
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CIVIL ACTION No. G-79-124

BEATRICE MAE HANSEN, etc., et al,
Plaintiff

v.

JOHNS-MANVILLE SALES CORPORATION,
Defendant

(Filed April 27, 1982)

MEMORANDUM AND ORDER

Plaintiff brought this diversity action seeking actual and exemplary damages for the wrongful death of her husband, Andrew T. Hansen. Plaintiff alleged that her husband's death was caused by exposure during the course of his employment at Todd Shipyards to asbestos-containing products manufactured and sold by the defendant. The case was tried before a jury upon theories of product liability, negligence, and gross negligence.

The jury returned a verdict for the plaintiff, awarding the plaintiff $1,060,000 in compensatory damages. Additionally, the parties had stipulated to a sum of $10,500 as the reasonable and necessary medical expenses incurred by the decedent.

Pending before the Court is the plaintiff's motion for entry of judgment, and the defendant's motion for judg-

ment notwithstanding the verdict as to the award of punitive damages. For the reasons set forth below, the defendant's motion for judgment notwithstanding the verdict is denied, and plaintiff's motion for entry of judgment is granted.

In *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969), the Fifth Circuit established the standard by which this Court must determine whether there is sufficient evidence to submit a case to the jury in connection with motions for directed verdict and for judgment *non obstante veredicto*. Under the standard established in *Boeing* a motion for judgment n.o.v. should be granted only when the facts and inferences point so strongly and overwhelmingly in favor of the moving party that reasonable persons could not arrive at a contrary verdict. The Court should consider all of the evidence, not just that evidence which supports the non-movant's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If there is substantial evidence opposed to the motion, that is, evidence of such quality and weight that reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions, the motion should be denied. There must be a conflict in substantial evidence to create a jury question; a mere scintilla of evidence is insufficient. However, it is the function of the jury as a traditional finder of fact, and not the court, to weigh conflicting evidence and inferences, and to determine the credibility of witnesses. *Id.* at 374-75; *Maxey v. Freightliner Corp.*, 665 F.2d 1367, 1371 (5th Cir. 1982). *See Schwartz v. Sears, Roebuck & Co.*, 669 F.2d 1091, 1093 (5th Cir. 1982).

In this case the *Boeing* standard must be applied in light of substantive state law governing the availability of exemplary or punitive damages for wrongful death. Under Texas law, gross negligence can be a ground for punitive damages. Tex. Const. art. 16 § 26. Texas courts traditionally have defined gross negligence as "that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person or persons to be affected by it." *Missouri Pacific Railroad Co. v. Shuford,* 72 Tex. 165, 10 S.W. 408, 411 (1888). *See Burk Royalty Co. v. Walls,* 616 S.W.2d 911 (Tex. 1981).

The essence of gross negligence is not the neglect which must, of course, exist. What lifts ordinary negligence into gross negligence is the mental attitude of the defendant; that is what justifies the penal nature of the imposition of punitive damages. The plaintiff must show that the defendant was consciously, *i.e.,* knowingly, indifferent to his rights, welfare and safety. In other words, the plaintiff must show that the defendant knew about the peril, but his acts or omission demonstrated that he did not care. *Burk Royalty, supra,* at 922. Thus, rather than simply inquiring whether the defendant exercised some care or no care, the proper focus under Texas law is whether, in light of all the surrounding circumstances, the requisite mental state is shown. *Maxey v. Freightliner, supra,* at 1374.

Having reviewed the instant record under the standard established in *Boeing,* as informed by the substantive principles articulated in *Burk Royalty,* the Court is of the opinion that the jury's finding of gross negligence,

and its award of punitive damages, must be sustained. Giving proper deference to the traditional functions of the jury as the finder of fact, the Court is of the opinion that there is evidence of such quality and weight, when viewed most favorably to the plaintiff, that reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions as to whether there was such an entire want of care as to show that the defendant was consciously indifferent to the rights, welfare, and safety of the decedent. The evidence established almost beyond dispute that the decedent's death was the result of his exposure during the 1940's to defendant's asbestos-containing products. There was a substantial evidentiary conflict as to the defendant's knowledge of the dangerous propensities of its products at that time, and the issue was properly submitted to the jury. Having determined the extent of the defendant's knowledge, the determination whether the defendant's conduct in light of all the surrounding circumstances, evidenced conscious indifference to the rights and welfare of the decedent, *i.e.*, that the defendant "didn't care," *Burk Royalty, supra,* at 922, was one to be made by the finder of fact. *See Schwartz v. Sears, Roebuck & Co., supra,* at 1095.

Therefore, it is ORDERED, ADJUDGED and DECREED that the defendant's motion for judgment n.o.v. is DENIED, and that the plaintiff's motion for entry of judgment is GRANTED.

DONE at Galveston, Texas, this the 27th day of April, 1982.

/s/ HUGH GIBSON
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CIVIL ACTION No. G-79-124

BEATRICE MAE HANSEN,
Plaintiff

v.

JOHNS-MANVILLE SALES CORPORATION,
Defendant

(Filed June 8, 1982)

ORDER

BEFORE THE COURT are the defendant's motions for new trial or, in the alternative, for remittitur. Having considered said motions, the Court is of the opinion that they should be in all respects denied. Therefore, it is

ORDERED, ADJUDGED and DECREED that defendant's motions for new trial, or in the alternative, for remittitur be, and the same hereby are DENIED.

DONE this the 8th day of June, 1982, at Galveston, Texas.

/s/ HUGH GIBSON
United States District Judge

APPENDIX G

UNITED STATES CONSTITUTION, FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX H

UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX I

26 U.S.C. §104

(a) In general.—Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include—

* * *

(2) the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness;

* * *

APPENDIX J

FEDERAL RULE OF CIVIL PROCEDURE 51

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

FILED
FEB 3 1985
ALEXANDER L. STEVAS
CLERK

84-1131

NO. 84-917

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

BEATRICE M. HANSEN, ET AL,
Petitioners

v.

JOHNS-MANVILLE SALES CORPORATION, ET AL,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY TO RESPONDENTS' CROSS-PETITION FOR WRIT OF CERTIORARI

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Alpha Law Brief 3003
BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

Did the Fifth Circuit err in refusing to require the Income Tax Instruction of Norfolk & Western Railway Co. v. Liepelt, 444 U.S. 490, ____S.Ct.____, ____L.Ed.2d ____, (1980) ("Liepelt") to the present case at Bar which was based upon a State Cause of Action between two private individuals.

Did the Fifth Circuit err in upholding an award of punitive damages in a suit alleging causes of action based upon Strict Liability in Tort, and upon negligence for failure to adequately test and inspect and for failure to warn, when the evidence supported a finding that the acts of manufacturer constituted "gross negligence" as defined by Texas Law, and when there has been no indication by the Texas Courts that punitive damages would be disallowed in such a case.

LIST OF PARTIES

Pursuant to Rule 21.1(b), counsel for Respondents certify that the following is a complete list of all parties:

(1) Beatrice M. Hansen, Respondent.

(2) Johns-Manville Sales Corporation, Cross-Petitioner and Respondent.

(3) Johns-Manville Products Corporation, Cross-Petitioner and Respondent.

(4) The Travelers Insurance Company, Intervenor.

(5) The Charter Oak Fire Insurance Company, Intervenor.

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NO. 84-917

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

BEATRICE M. HANSEN, ET AL,
Petitioners

v.

JOHNS-MANVILLE SALES CORPORATION, ET AL,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY TO RESPONDENTS' CROSS-PETITION FOR WRIT OF CERTIORARI

To The Honorable United States Supreme Court:

COMES NOW Cross-Respondents and, in reply to Cross-Petitioners' Application for Writ of Certiorari seeking Review of the Fifth Circuit's June 11, 1984 Judgment, pray the Writ not Issue and that the same be denied.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 734 F.2d 1036 (5th Cir. 1984) and is attached as Appendix A in the Petition. The Court's Order denying the Motion for Rehearing is attached as Appendix B in the Petition. The Jury Verdict and the Trial Court Judgment are attached as Appendix C and D in the Petition.

JURISDICTION

Cross-Petitioners seek to invoke jurisdiction via 28 U.S.C. Sec. 1254(1). The Fifth Circuit's Judgment was entered on June 11, 1984, and Motions for Rehearing denied on September 12, 1984.

FEDERAL STATUTES AND RULES INVOLVED

United States Constitution, Fifth Amendment.
United States Constitution, Fourteenth Amendment.

STATEMENT OF THE CASE

ANDREW T. HANSEN, ("Decedent") began working for Todd Shipyards in Galveston, Texas in 1940, as a pipefitter, whereby he would tear out old insulation in ships and install new insulation. During his employment, Decedent worked primarily with products containing asbestos that were manufactured by JOHNS-MANVILLE. Decedent suffered an ankle injury in 1976 and retired.

In 1978, at age 65, Decedent who had been in good health began to develop chest problems. MR. HANSEN was diagnosed as suffering from severe respiratory illnesses, being that of Asbestos-associated diseases, namely, Asbestosis and malignant Mesothelioma. MR. HANSEN

lived for thirteen (13) months thereafter, whereby he was hospitalized five (5) times and had to undergo chemotherapy. MR. HANSEN died on August 5, 1979.

A Jury Trial on Special Interrogatories was had and Judgment in the amount of $2,070,500.00 was entered on May 11, 1982.

JOHNS-MANVILLE sought a Liepelt Income Tax Instruction which the Trial Court refused. Post-Trial Motions were filed by JOHNS-MANVILLE, all of which were denied, and Supersedes Bond was filed and approved.

The Fifth Circuit affirmed the Trial Court refusal to give the Liepelt Instruction and refused to strike punitive damages.

REASONS FOR DENYING CERTIORARI

JOHNS-MANVILLE sets out eight grounds to grant Certiorari:

(1) The Fifth Circuit holds that *Liepelt* is "inapposite" to the case at Bar and limits *Liepelt* to F.E.L.A. cases. This conflicts with *Liepelt's* holding and reasoning, as well as with *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 101 S.Ct. 2870, 69 L.Ed.2d 784 (1981) ("Gulf Offshore").

(2) The Fifth Circuit conflicts with other Circuits in a wrongful death case based on diversity jurisdiction where the State practice forbids a Liepelt instruction.

(3) The lower court's mis-reading of *Liepelt* and its progeny results in inflated Jury verdicts.

(4) The applicability and scope of the *Liepelt* instruction is an important question of Federal Law which should be settled.

(5) The Fifth Circuit, in approving multiple awards of Punitive damages in Mass Tort Litigation, conflicts with other opinions, within the Fifth Circuit and with other Circuits.

(6) Multiple punitive damage awards in Mass Tort Litigation exceeds the level necessary to punish and deter.

(7) Multiple punitive damage awards in Mass Tort Litigation spells the defeat of the purpose behind Strict Liability and Punitive Damages.

(8) Strict Liability and Punitive damages are inherently compatible.

Cross-Respondent then briefly replies.

Rule 17 notes that Certiorari is granted only where special and important reasons exist. JOHNS-MANVILLE attempts to invoke Rule 17.1(a) (conflicting opinions) and Rule 17.1(c) (important unsettled questions). Cross-Respondents assert that none of JOHNS-MANVILLE'S "reasons" validly apply under Rule 17 Guidelines.

ARGUMENT AND AUTHORITIES
(Points 1 thru 4)

JOHNS-MANVILLE requested that the District Court instruct the Jury that damage awards are not subject to Federal taxation. The District Court refused. JOHNS-MANVILLE asserts that this refusal was error, to which the Fifth Circuit did not agree (A-16 of Petition).

JOHNS-MANVILLE'S reliance upon *Norfolk & Western Railway Co. v. Liepelt,* 444 U.S. 490 (1980), and *Gulf Offshore Co. v. Mobil Oil Corp.,* 628 S.W.2d 171 (Tex. Civ. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.), as to the present case at Bar is misplaced. It appears that JOHNS-MANVILLE has taken words and phrases and quotes, out of context, organized in such way as to give the appearance of some bases for its argument. This Honorable Court in *Norfolk & Western Railway Co. v. Liepelt,* supra, concluded as a matter of Federal law, *the Jury in an FELA case must be instructed on request that the damages award is not taxable.* (Emphasis added). Further, as this Court stated, one of the purposes of the Federal Employer's Liability Act was to "create uniformity throughout the Union" with respect to railroads' financial responsibilities for injuries to their employees. *Liepelt,* supra, n. 5; see also, H. R. Rep. No. 1386, 60th Cong., 1st Sess. p. 3 (1908).

JOHNS-MANVILLE also relies heavily on this Court's opinion in *Gulf Offshore Co. v. Mobil Oil Corp.,* 453 U.S. 473, 101 S.Ct. 2870, 66 L.Ed.2d (1981). As set forth in the opinion, the case required the Supreme Court to determine whether Federal Courts have exclusive jurisdiction over personal injury and indemnity cases arising under the Outer Continental Shelf Lands Act, 67 Stat. 462, as amended, 43 U.S.C. Sec. 1331 et seq. (1976 ed. and Supp. III). It was also considered whether the rule of *Liepelt,* that the Jury be instructed that personal injury damage awards are not subject to Federal Income Taxation, is applicable to such a case.

JOHNS-MANVILLE omits any mention of *Gulf Offshore,* supra, being remanded to the Texas Court of Civil

Appeals for a determination of whether Louisiana Law requires the instruction and, if it does not, whether *Liepelt* displaces the State Rule *in an OCSLA case.* (Emphasis added) (*Gulf Offshore* at p. 2880). Upon remand to the Texas Court of Civil Appeals, it was noted by the Appellate Court that it has been recognized by the Supreme Court in *Chevron Oil Co. v. Huson,* 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), that unless a Federal law is *applicable* to the particular case, the State law is not inconsistent with it. The State Appellate Court further stated:

> "It seems important to this Court that the United States Supreme Court in the instant case saw fit to restate with approval its early statement in *Huson* to the effect that in OCSLA Congress borrowed a remedy provided by State law and thereby 'specifically rejected National Uniformity' as a paramount goal. 101 S.Ct. at 2880."[1]

Thus, for the reasons set forth above, the Texas Appellate Court in *Gulf Offshore* held that the rule announced in *Liepelt* does not displace the State rule in an OCSLA case and thus having decided the questions mandated by the Supreme Court of the United States, the Judgment of the Trial Court was affirmed. *Gulf Offshore,* supra, at p. 175.

As was correctly stated by the Fifth Circuit, the argument of JOHNS-MANVILLE on these issues is entirely misplaced. HANSEN alleged causes of action based upon Strict Liability for the manufacture of the asbestos-containing insulation and upon negligence for failure to ade-

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1. *Gulf Offshore Co. v. Mobil Oil Corp.,* 628 S.W.2d 171 (Tex. Civ. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.), at p. 174, 175.

quately test and inspect, and for failure to warn, and the Jury returned answers to Special Interrogatories accordingly. Thus, the present case at Bar involves a matter brought under Texas (State) law, and that law applies to the question whether such an instruction was warranted. *Croce v. Brumley Corp.*, 623 F.2d 1084, 1097 (5th Cir. 1980). It was correctly observed by the Fifth Circuit in *Croce,* supra, that *Liepelt* did not control the decision because the wrongful death action in *Liepelt* arose under the FELA and not under a State statute, and such distinction was crucial. *Croce,* supra at 1096.

It was also correctly observed in *Croce* that it has long been settled that questions concerning the measure of damages in an FELA action are federal in character, however, in the *Croce* case federal concerns were lacking (just as they are lacking in the present case at Bar) as the wrongful death action was a Statutory creation of the State and the measure of damages to be recovered was governed by State law. *Croce,* supra at 1097; see also, n. 32, p. 1094.

The Court in *Croce,* supra, went on to state that:

> "Nor is the need for uniformity throughout the United States, which was 'one of the purposes of the Federal Employers' Liability Act,' id, 100 S.Ct. at 757 n. 5, implicated in a cause of action brought to vindicate a state-created right despite some broad language approving an instruction that informs a Jury that an award of damages will not be subject to income tax, see id. 100 S.Ct. at 759, there is no suggestion that the Supreme Court in *Liepelt* intended to require a Trial Judge to give such an instruction in wrongful death actions predicated upon State statutes."

Croce, supra, at p. 1097.

Texas law explicitly disapproves of such an instruction because it introduces a collateral matter into the damage issue. *Missouri-Kansas-Texas R.R. Co. v. McFerrin,* 291 S.W.2d 931, 945 (Tex. 1956); *Caterpillar Tractor Co. v. Gonzales,* 599 S.W.2d 633 (Tex. Civ. App.—El Paso, 1980, writ ref'd n.r.e.).[1a]

In support of the argument that the Fifth Circuit Decision on this issue conflicts with decisions in other Circuits, JOHNS-MANVILLE refers to the Seventh Circuit case of *In Re Air Crash Disaster Near Chicago,* 701 F.2d 1189 (7th Cir. 1983), and that the rationale set forth therein should apply to all causes of action involving wrongful death and damages which are to be submitted to the Jury. One important distinction however is the fact that the Illinois Supreme Court has never decided whether evidence of the hypothetical tax liability of lost earnings is admissible in wrongful death cases, which is the exact opposite of Texas, whereby this element of "tax instruction" has been firmly established for many years. Another distinction was the fact that Illinois' substantive measure of damages is identical to the FELA measure of damages. *In Re Air Crash Disaster,* at p. 1195, 1199.

In Federal diversity actions the substantive State policies should be followed if it would be unfair to the citizens of the Forum State not to follow them. *Hanna v. Plumer,* 380 U.S. 460, 468 (1965). The Fifth Circuit has held that determining damages in a diversity case is substantive and State law is to be followed. *Budge v. Post,* 643 F.2d 372 (5th Cir. 1981).

Texas Courts have consistently held the impact of Federal income taxation to be immaterial and inadmis-

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1a. See also, *Turner v. General Motors Corp.,* 584 S.W.2d 844, 853 (Tex. 1979).

sible. (*Missouri-Kansas-Texas R.R. Co., v. McFerrin,* supra, *Texas Consol. Transp. Co. v. Eubanks, Turner v. General Motors Corp.,* supra, *Caterpillar Tractor Co., v. Gonzales,* supra.) It is clear that this case is brought under Texas law, and Texas law applies to the question whether such an instruction was warranted, and that the present case at Bar is clearly distinguishable between *Liepelt* (F.E.L.A.) and *Gulf Offshore* (a case brought under Louisiana Substantive Law). Further, it is clear that the question is not one of Federal law and that the District Court properly refused to give the requested instruction, and the Fifth Circuit was correct in affirming the refusal to give a *Liepelt* instrcution.

COUNTER POINTS 5 THROUGH 8

JOHNS-MANVILLE wants this Court to absolve them totally from potential Punitive Damage liability regardless of the nature of their conduct or their present financial condition. The thrust of their argument is the Fifth Circuit Decision which construed Mississippi Substantive Law in the case of *Jackson v. Johns-Manville Sales Corp.,* 727 F.2d 506 (5th Cir. 1984), together with the confessed dicta of Judge Friendly in *Roginsky v. Richardson-Merrell, Inc.,* 378 F.2d 832 (2nd Cir. 1967).

JOHNS-MANVILLE has raised several issues with regard to the Jury's finding of gross negligence and the award of Punitive Damages, including the potential for overkill in the award of Punitive Damages in Mass Products Liability situations as being inconsistent with the underlying policy objectives of both Strict Liability and Punitive Damages. JOHNS-MANVILLE also argues that it has been subjected to repeated awards of Punitive damages, thus unconstitutionally subjecting it to double

jeopardy, and to loss of property without due process of law.

Under Texas law, a Plaintiff is entitled to Punitive Damages upon a showing of gross negligence, i.e., that the Defendant was consciously, knowingly indifferent to the Plaintiff's welfare and safety. *Maxey v. Freightliner Corp.*, 665 F.2d 1367, 1374 (5th Cir. 1982). In *Jackson v. Johns-Manville Sales Corp.*, supra, the Fifth Circuit held that Mississippi Substantive Law would disallow Punitive damages in asbestos products liability actions, and for the reasons stated therein, the panel of the Fifth Circuit disallowed the punitive damages awarded, holding that Mississippi Substantive Law would disallow such awards in a similar situation.[2] (See also, A-7 of Petition).

JOHNS-MANVILLE presents similar arguments in the present case at Bar, urging that the very attributes of the Mississippi Law of Strict Liability that prompted the *Jackson* panel to find that Mississippi Law would disallow punitive damages in this type of case are present in Texas law as well. Thus, JOHNS-MANVILLE argues that this Honorable Court should follow the panel's decision in *Jackson.*

Article 16, Sec. 26 of the Constitution of the State of Texas provides:

> "Every person, corporation, or company, that may commit a homicide, through a willful act, or omission, or gross neglect, shall be responsible, in exemplary damages, to the surviving husband, widow, heirs of his or her body, or such of them as there may be . . ."

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2. 734 F.2d 1036.

In *Heil Co. v. Grant,* 534 S.W.2d 916, 926 (Tex. Civ. App.—Tyler, 1976, writ ref'd n.r.e.), the Texas Appellate Court stated that it believed that exemplary damages may be recovered under Article 16, Sec. 26 of the Constitution of the State of Texas, in a Strict Liability Action for the death of the user of a defective product. (Appendix A-8 of Petition); see also, *Maxey v. Freightliner Corp.,* 665 F.2d 1367, 1371-72, & n. 4 (5th Cir. 1982).

As set forth in the HANSEN opinion, the Fifth Circuit states that in the case of *Maxey v. Freightliner Corp.,* supra, the Circuit was presented with the argument that, as a matter of law, punitive damages were not available in Products Liability cases in Texas. Noting the language in *Heil,* supra, the Fifth Circuit stated:

> "Absent some reason to believe that the Texas Courts, when presented with the question, will erect such a Bar to recovery of exemplary damages, which otherwise are guaranteed by the Texas Constitution, this Court is reluctant to do so."[3]

As was further pointed out by the Fifth Circuit in the HANSEN opinion, that, in addition to the Texas Constitutional provision, there is another factor which distinguishes *Jackson* and Mississippi Law from the present case and Texas law. *Jackson,* did not involve an action for wrongful death, but was instead an action for personal injury. As observed by the Fifth Circuit, the Texas Supreme Court has yet to address the issue, however, at least one (1) Appellate Court has upheld an award of Punitive damages in a Products Liability action for personal injury which did not involve wrongful death,

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3. Appendix A-8 of Petition, n. 7; (see also, Maxey v. Freightliner Corp., supra, at 1317 n. 4)

citing, *Rawlings Sporting Goods Co. v. Daniels,* 619 S.W.2d 435 (Tex. Civ. App.—Waco, 1981, writ ref'd n.r.e.), and thus, as further set forth by the Fifth Circuit, there is some suggestion that the Texas Courts may allow punitive damages in Products Liability actions even in cases not covered by Article 16, Sec. 26.[4]

Thus, the Fifth Circuit correctly observed that the only suggestion from the Texas Court is that there is, indeed, such a right to punitive damages in Strict Liability actions for the death of a user of a defective product, and that absent a clear indication from the Texas Courts to the contrary, the Fifth Circuit was Erie-bound[5] not to dictate otherwise, and accordingly, found no basis upon which to hold that Texas Courts would disallow punitive damages in a case such as this.[6]

Although Congress has given some consideration to Product Liability Litigation in general, and with the concerns of asbestos injuries in particular,[7] it has not decided what solution, if any, is called for. There is no further policy in this area that justifies a Federal Court in a diversity action defining what are the elements of compensatory damages or whether punitive damages should be available.

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4. Appendix A-9 of Petition, n. 8.

5. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

6. Appendix A-9 of Petition.

7. Product Liability Act, S. 44, 98th Cong., 1st Sess. (1983), hearings before the Subcommittee on the Consumer, Senate Commerce Committee, 98th Cong., 2nd Sess. (1984); Occupational Disease Compensation Act of 1983, H.R. 3175, 98th Cong., 1st Sess. (1983), hearings before the Subcommittee on Labor Standards, House Education & Labor Committee, 98th Cong., 1st Sess. (1983); Asbestos Workers Recovery Act of 1984, S. 2708, 98th Cong., 2d Sess. (1984).

Neither is this a case in which unique Federal interests are involved. This is an action between private parties, in which no Federal interests have been claimed or adverse impact on federally related rights have been shown. *Bank of Am. Nat'l T. & S. Ass'n. v. Parnell,* 352 U.S. 29 (1956). This is strictly a diversity action with no federal question raised on Appeal. It is thus a case which should unquestionably be governed by State law. *Miree v. DeKalb County,* 433 U.S. 25, 28 (1977).

In the absence of some Federal interest which has not been claimed or shown to exist, this matter is within parameters of *Erie* and Federal Court must apply State law. *Texas Ind., Inc. v. Radcliff Materials, Inc.,* 451 U.S. 630 (1981); *City of Milwaukee v. Illinois,* 451 U.S. 304 (1981); *Northeast Airlines, Inc. v. Transport Workers Union of Am., AFL-CIO,* 451 U.S. 77 (1981).

As pointed out in the Fifth Circuit opinion, JOHNS-MANVILLE contends that the award of Punitive damages in Mass Tort Cases is unconstitutional because punitive damages are analogous to criminal penalties. JOHNS-MANVILLE argued that the Constitution requires assurance against multiple, unrestrained, punishments in the form of punitive damages, and that it is being subjected to double jeopardy, and is being deprived of property without due process, and is subjected to "overkill" by repeated punitive damage awards which will lead to its demise. Thus, JOHNS-MANVILLE urges that punitive damages should not be awarded against a company that faces a multitude of Product Liability actions, for if punitive damages are awarded in many of these actions, JOHNS-MANVILLE argues that it will not be punished, but destroyed.

Much of the impetus for the viewpoint of JOHNS-MANVILLE is traceable to Judge Friendly's opinion in *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967). In *Moran v. Johns-Manville Sales Corp.*, 691 F.2d 811 (1982), the Sixth Circuit Court of Appeals observed that however eloquent the essay, it is confessed dictum. The Sixth Circuit went on to state that Judge Friendly noted that the New York cases afford no basis for predicting that the New York Court of Appeals would adopt a rule disallowing punitive damages in a case such as this, and that the *Erie* doctrine wisely prevents the Sixth Circuit in engaging in such extensive law-making on local Tort Liability, a subject which the people of New York have entrusted to their Legislature and, within limits to their own Courts, and not to the Appellate Courts. The Sixth Circuit continued in stating that the relief sought by JOHNS-MANVILLE may be more properly granted by the State or Federal legislature than by the Sixth Circuit itself, and the fact, that such legislative relief was being considered by Asbestos-product manufacturers. (*Moran*, at p. 817; see also, 68 A.B.A.J. 398 (April 1982); *New York Times*, August 10, 1982, at 34).

The Fifth Amendment guarantee against double jeopardy, applicable to the States through the Fourteenth Amendment, protects against multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1968). However, the jeopardy to which the Fifth Amendment refers is not present in proceedings that are not "essentially criminal". *Breed v. Jones*, 421 U.S. 519, 528 (1974).[8]

As pointed out by the Fifth Circuit, no cases have been uncovered, and JOHNS-MANVILLE has pointed

8. See also, Appendix A-10 of Petition.

to none, in which a Court has afforded double jeopardy protection as to any proceeding that was not initiated by the State. Accordingly, it was correctly found that JOHNS-MANVILLE has not been subjected to double jeopardy in violation of the Fourteenth Amendment.

In the case of *Fischer v. Johns-Manville Corp.*, 472 A.2d 577 (N.J. Supr. A.D. 1984) the Court was faced with the same basic argument that JOHNS-MANVILLE asserts herein, including the availability of punitive damages in a Products Liability case tried on Strict Liability principles and punitive damages in Mass Tort Litigation. Reference was made in the *Fischer* opinion to an event of 1976 where there appeared a Law Review Article which argued persuasively in favor of allowing punitive damages in appropriate Products Liability cases, effectively countering the public policy concerns expressed in *Roginsky*, supra. The Law Review Article referred to was Owen, "Punitive Damages In Products Liability Litigation," 74 Mich. L. Rev. 1257 (1976). The *Fischer* Court went on to state that following the publication of Professor Owen's article, the issue has been raised in at least twenty (20) jurisdictions across the country. Virtually all of them, and many in reliance on the Owen article, have found neither a conceptual nor a public policy bar to the allowance of punitive damages in Products Liability actions.[9]

The *Fischer* Court went on to state that they are in full agreement with the observation of the Court in *Neal*

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9. Fischer at 582, for the many, many jurisdictions who have found neither a conceptual nor a public policy bar to the allowance of punitive damages in Products Liability actions, including Texas, Rawlings Sporting Goods Co., Inc. v. Daniels, 619 S.W.2d 435 (Tex. Civ. App.—1981).

v. Carey Canadian Mines, Ltd., 548 F. Supp. 357 (E.D. Penn. 1982), whereby it is stated at p. 378, that:

> ". . . there is no theoretical problem in a Jury finding that a Defendant is liable because of the defectiveness of a product and then judging the conduct of the Defendant in order to determine whether punitive damages should be awarded on the basis of 'outrageous conduct' in light of the injuries sustained by the Plaintiff.
>
> . . . By dispensing with the need to prove fault for purposes of establishing liability under Section 402A (Of Restatement 2d Torts (1965)) the law of Strict Liability does not preclude consideration of 'aggravated fault,' if the Plaintiffs can properly meet their burden of demonstrating sufficient evidence of the Defendant's outrageous conduct."[10]

The Court in *Fischer,* supra, also agreed with the view of the many cases cited therein, that the predication of wholesale insolvency caused by puntive damages awards is much exaggerated (*Fischer,* supra, at 586). The Court concurred, moreover, with the judicial consensus that the legitimate interest of Product-Liability Defendants can be served by careful judicial scrutiny of the adequacy of Plaintiffs' proof regarding outrageous conduct, by monitoring excessive punitive damage awards, and by allowing the introduction into evidence of all pertinent financial circumstances of the Defendant, including its contingent liabilities.

In the case of *Acosta v. Honda Motor Co., Ltd.*, 717 F.2d 828 (3rd Cir. 1983), there is set forth that the

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10. See also, Acosta v. Honda Motor Co., Ltd., 717 F.2d 828 (3rd Cir. 1983); Piper Aircraft Corp. v. Coulter, 426 So.2d 1108 (Dist. Ct. App. Fla. 1983); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 294 N.W.2d 437 (Sup. Ct. 1980).

Restatement (Second) of Torts does include a generally applicable provision regarding punitive damages. Section 908(2) declares:

> "Punitive damages may be awarded for conduct that is outrageous, because of the Defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the Defendant's act, the nature and extent of the harm to the Plaintiff that the Defendant caused or intended to cause and the wealth of the Defendant." (*Acosta* at 834).

As pointed out by the Court in *Acosta,* supra, nowhere in Section 908(2) of the Restatement, as cited above, or in the comments thereto, did the drafters suggest that these principles should not apply to Strict Products Liability, and the Court in *Acosta* thereby concurred with the considered opinion of the Court of Appeals for the Fifth Circuit that "punishment and deterence, the basis for punitive damages . . . are no less appropriate with respect to a product manufacturer who knowingly ignores safety deficiencies in its product that may endanger human life" than in other cases in which "the Defendant's conduct shows wantonness or recklessness or reckless indifference to the rights of others." (See also, *Dorsey v. Honda Motor Co.,* 655 F.2d 650, 658 (5th Cir. 1981) (construing Florida law), opinion modified on rehearing, 670 F.2d 21 (5th Cir.) cert. denied, ____U.S.____, 103 S.Ct. 177, 74 L.Ed.2d 145 (1982)).

In Texas, punitive damages in a Civil Action are awarded for wanton, reckless, and grossly negligent conduct or conscious indifference to the rights and welfare of others. *Burk Royalty Co. v. Walls,* 616 S.W.2d 911

(Tex. 1981); *Bennett v. Howard,* 141 Tex. 101, 170 S.W.2d 709 (1943); *Sheffield Division, Armco Steel Corp. v. Jones,* 376 S.W.2d 835 (Tex. 1964); *Maxey v. Freightliner Corp.,* 722 F.2d 1238 (5th Cir. 1984).

Texas Courts have permitted an award of punitive damages in product liability suits. *Maxey v. Freightliner Corp.,* 450 F.Supp. 955 (N.D. Tex. 1978), aff'd, 623 F.2d 395 (5th Cir. 1980), *rev'd on other grounds,* 665 F.2d 1367 (5th Cir. 1982) (en banc); *Ford Motor Co. v. Nowak,* 638 S.W.2d 582 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.); *Rawlings Sporting Goods Co., Inc. v. Daniels,* 619 S.W.2d 435 (Tex. App.—Waco, 1981, writ ref'd n.r.e.); *Heil Co. v. Grant,* 534 S.W.2d 916 (Tex. App.—Tyler, 1976, writ ref'd n.r.e.).

In *Heil Co. v. Grant,* supra, exemplary damages were recovered under Article 16, Sec. 26, of the Texas Constitution in a Strict Liability action for the death of the user of a defective product. In all the Texas cases where recovery of punitive damages has been allowed or indicated, the elements of malice, actual knowledge, and reckless conduct, have been involved and submitted. (*Heil Co. v. Grant,* supra, *Rawlings Sporting Goods, Inc. v. Daniels,* 619 S.W.2d 435 (Tex. Civ. App.—Waco 1981, writ ref'd n.r.e.); *Ford Motor Co. v. Nowak,* supra).

Thus, regardless of whether the "Products Liability" case is one of negligence, breach of warranty, or "Strict Liability", under Section 402A of the Restatement of Torts (Second), punitive damages may only be awarded in Texas under the Scienter discussed in *Maxey v. Freightliner,* 665 F.2d 1367 (5th Cir. 1982) (en banc), and, of course, with the holdings in *Burk Royalty Co. v. Walls,* 616 S.W.2d 911 (Tex. 1981), *Putnam v. Missouri Valley,*

Inc., 616 S.W.2d 930 (Tex. 1981) and *Alamo National Bank, et al v. Krauss*, 616 S.W.2d 908 (Tex. 1981), when the "Products" case is based upon "gross negligence", and those evidentiary considerations are present, the Court will uphold such award. Cf. *Dorsey v. Honda Motor Co., Ltd.*, supra, at page 657.

The relief that JOHNS-MANVILLE is asking this Court to grant evokes the words of Chief Justice Burger in *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980):

> "The choice we are urged to make is a matter of high policy for resolution within the Legislative process after the kind of investigation, examination, and study that Legislative bodies can provide and Courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives. Whatever their validity, the contentions now pressed on us should be addressed to the political branches of the government, the Congress and the Executive, and not to the Courts."

Despite the reliance upon the confessed dicta of Judge Friendly in *Roginsky*, supra, JOHNS-MANVILLE admits that casual dicta is not afforded a great deal of deference. (Cross-Petition, p. 23). JOHNS-MANVILLE also admits that the law to be applied under *Erie* principles is that which the Supreme Court of a State *would apply*, citing, *Comm'r of I.R.S. v. Estate*, 387 U.S. 456, 465, ____S.Ct. ____, ____L.Ed.2d____ (1967) (Emphasis added). JOHNS-MANVILLE further quotes from the Supreme Court opinion of *Comm'r of I.R.S.*, whereby it is set forth that, "while the decree of lower State Courts should be attributed some weight, the decision is not controlling . . . where the Highest Court of the State has not spoken on

the point." (Brief of Cross-Petitioner p. 23). However, JOHNS-MANVILLE conveniently omits the remainder of the passage from the opinion whereby the passage continues ". . . And in *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 61 S.Ct. 179, 85 L.Ed. 139 (1940), this Court further held that "an intermediate Appellate State Court . . . is a datum for ascertaining State law which is not to be disregarded by a Federal Court unless it is convinced by other persuasive data that the Highest Court of the State would decide otherwise.' " (*Comm'r of I.R.S.*, supra, at 1782). Needless to say, JOHNS-MANVILLE has not submitted persuasive authority that the Supreme Court of Texas would decide otherwise, given the authority set forth by HANSEN herein, but has only supplied this Court with phrases taken out of context and half-quotes.

Finally, JOHNS-MANVILLE asserts that the "writ ref'd n.r.e." designations in the writ histories of both *Heil* and *Rawlings* indicates that the Texas Supreme Court was not satisfied that either had correctly declared the law. Again, this argument is misplaced. This same argument was presented in *Rock Island Independent School District v. County Board of School Trustees*, 423 S.W.2d 665 (Tex. Civ. App.—Houston [14th Dist.] 1968), whereby it was contended that such a refusal "no reversible error" did not indicate an outright approval by the Supreme Court of the language of the Courts of Civil Appeals. The Court in *Rock Island Independent School District*, clarified and left no doubt when it stated that:

> "However, such qualification of its refusal of a writ by the Supreme Court does not indicate a disapproval

> of the language of the Courts of Civil Appeal. Furthermore, even such a qualified refusal by the Supreme Court of the Applications for Writ of Error indicates an approval of the results reached by the Courts of Civil Appeals." (*Rock Island* at p. 669).

Given the above, it is clear that the Fifth Circuit was correct in the assessment of applicable law to the determination herein, together with its final assessment that absent a clear indication from the Texas Court to the contrary, the Fifth Circuit was bound by the decision in *Erie* not to dictate otherwise, and having found no basis upon which to hold that Texas Courts would disallow punitive damages in a case as this. (See Appendix A-8, 9 of Petition).

It must be remembered that the causes of actions alleged by HANSEN were based upon Strict Liability for the manufacturer of asbestos-containing insulation, and upon negligence for failure to test and inspect, and for failure to warn. Thus, given the above, it is clear that the Fifth Circuit opinion correctly stated that there is a clear indication from the Texas Courts that punitive damages are guaranteed by the Texas Constitution in Strict Liability actions for the death of a user of a defective product, after having found no basis upon which to hold that Texas Courts would disallow punitive damages in a case as this.

CONCLUSION AND PRAYER

It is clear that this case is brought under Texas law, and Texas law applies to both of the questions involved herein, namely, whether an income tax instruction is

warranted in such a case, and, the applicability of punitive damages in Products Liability actions, containing allegations of negligence.

Texas Courts have consistently held the impact of Federal Income Taxation to be immaterial and inadmissible as the same pertains to damage issues of causes of actions brought under Texas Law and thus the argument of JOHNS-MANVILLE that *Liepelt* is applicable to the present case at Bar is misplaced.

The Court of Appeals did not err in affirming the Trial Court refusal to give the *Liepelt* instruction.

Likewise, JOHNS-MANVILLE'S argument as to the awarding of punitive damages is also misplaced. There is no doubt that under Texas Law, a Plaintiff is entitled to punitive damages upon a showing of gross negligence, i.e., that the Defendant was consciously, knowingly indifferent to the Plaintiff's welfare and safety, and that the Constitution of the State of Texas provides for punitive damages as a result of a willful Act or Omission, or Gross Neglect in favor of surviving spouse or heir.

In the present case at Bar, there is a complete absence of some federal interest and thus the matter is within the parameters of *Erie,* and thus the Fifth Circuit was correct in applying State law because there was no basis upon which to hold that Texas Courts would disallow punitive damages in a case such as this, and JOHNS-MANVILLE has cited none.

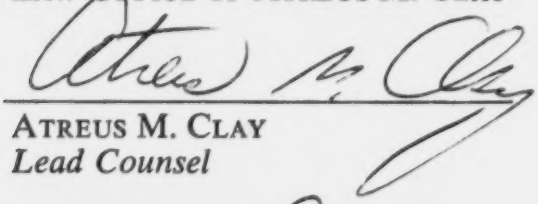
The Fifth Circuit also correctly found that JOHNS-MANVILLE has not been subjected to double jeopardy, nor have they been deprived of due process of law.

It is clear that the Fifth Circuit was correct in the assessment of applicable law to the determination of Punitive damages herein.

WHEREFORE, PREMISES CONSIDERED, Cross-Respondents pray that the Cross-Petition be denied, that the Fifth Circuit's opinion in these regards be, in all things, affirmed.

Respectfully submitted,

LAW OFFICE OF ATREUS M. CLAY



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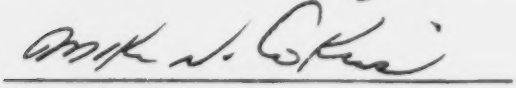

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of this Reply to Cross-Petition For Writ of Certiorari have been served upon opposing counsel herein by mailing the same to MR. ERVIN A. APFFEL, JR., McLeod, Alexander, et al, P. O. Box 629, Galveston, Texas 77553, by certified mail, return receipt requested, on this the 6 day of February, 1985.

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